AGENDA ITEM: 9-A

STAFF REPORT
SAN CLEMENTE PLANNING COMMISSION

Date: January 7, 2015

PLANNER: Amber Gregg, Associate Planner

SUBJECT: **Appeal of Building Permit B14-1374,** a request to appeal comments rendered by Planning Staff for a building permit to install a new double wide mobile home in the Capistrano Shores Mobile Home Park.

BACKGROUND

The Planning Division reviews two types of permits, discretionary permits and ministerial permits. Discretionary permits require public hearings and allow discretion for the final authority on the requested permit. For example, the Planning Commission can impose conditions of approval on a Conditional Use Permit to ensure there are no adverse negative impacts to surrounding properties.

Ministerial permits have no discretion. Staff reviews the proposed project and determines if it complies with the applicable codes, and if it does staff approves the request; no public hearing or noticing required. Examples of ministerial permits are building permits, administrative sign permits, and temporary banner permits.

Municipal Code Section 15.04.060, Board of Appeals, addresses appeals of a building permit and designates the Planning Commission as the Board of Appeals.

On August 21, 2014 the applicant, Eric Anderson, submitted plans for building permit review of a new double wide mobile home to be installed at 1880 N. El Camino Real, Space 22. The project site is zoned Open Space (OS2-S2-CZ) and the mobile home and mobile home park are considered legal nonconforming uses. Staff reviewed the request and Planning provided the following corrections to the applicant on September 22, 2014:

> *The proposed replacement of the existing 900 square foot mobile hole with a new 1,248 square foot mobile home does not comply with San Clemente Municipal Code Section 17.72.060, Nonconforming use restrictions.*
>
> *The proposed replacement mobilehome constitutes a 348 square foot (39%) increase in the square footage of the existing mobile home, which is a nonconforming use. The current zoning code does not allow the expansion of nonconforming uses.*

For the complete letter of correction provided to the applicant please see Attachment 2. The applicant filed an appeal of this action on September 30, 2014; the appeal is provided under Attachment 3.

Prior to the building permit application submitted by the applicant, staff had been working on amending the Nonconforming section of the Zoning Ordinance to address Nonconforming mobile home and mobile home park uses. This amendment was reviewed by the Planning Commission on November 19, 2014 where a unanimous recommendation of approval was forwarded to the City Council. The City Council reviewed and approved the amendment at their December 16, 2014, meeting with a second reading occurring on January 6, 2015.

The approved amendment, which will go into law 30 days after it is signed following the second reading, will modify the Zoning Ordinance and would permit the proposed project, pending California Coastal Commission approval and completion of the building permit process. The applicant has been kept aware of the amendment and understands its effects.

PROJECT DESCRIPTION

Appeal

The applicant submitted an appeal of the Planning Division comments regarding Building Permit 14-1374 noting "*this appeal is taken from the City of San Clemente Planning Division response effecting a categorical denial of a manufactured home installation permit to be issued by the City, acting on behalf of the State of California, as a local enforcement agency for the Mobilehome Parks Act, Cal. Health and Safety Code §18200 et seq.*"

PROJECT ANALYSIS

At the time the applicant filed the appeal, City Staff could not approve the building permit requested because it was not consistent with Zoning Ordinance. Since that time however, the City Council has reviewed and approved an amendment to the Zoning Ordinance that would allow approval of the proposed mobile home.

The City Council approved the addition of the below text to the Nonconforming Use section of the Municipal Code on December 16, 2014.

Add Municipal Code section 17.72.060(E):

E. ***Nonconforming mobile home and mobile home park uses****. Nonconforming mobile homes may be replaced, renovated, remodeled, expanded or repaired. New mobile home accessory structures and utility improvements are permitted. Mobile home park common areas, roadways, and utility improvements may also be added, repaired, renovated, remodeled, expanded or replaced. All mobile home and mobile home park improvements shall comply with California Code of Regulations, Title 25, Division 1, Chapter 2. Mobile Home Parks and Installations.*

By law the amendment must have a second reading. The second reading of the amendment was on January 6, 2015 and will go info effect 30 days after the Ordinance is signed.

In light of the approved amendment that permits the replacement of mobile homes consistent with Title 25, Chapter 2, staff recommends that the applicant wait until the Nonconforming Ordinance Amendment for mobile home and mobile home park uses goes into effect, and complete the permitting process for the proposed mobile home.

ENVIRONMENTAL REVIEW/COMPLIANCE (CEQA):

The proposed application is an appeal of a ministerial project and is Statutorily Exempt from CEQA pursuant to CEQA Guidelines section 15268 and 15369.

CALIFORNIA COASTAL COMMISSION REVIEW

The project is located in the Coastal Zone and is subject to review and approval by the California Coastal Commission.

ALTERNATIVES; IMPLICATIONS OF ALTERNATIVES

1. The Planning Commission can concur with staff and continue the appeal hearing until after the Ordinance's effective date, providing the applicant time to complete the building permit process and allow the Ordinance to become effective.

   This would allow the applicant to obtain the desired permit after the Ordinance goes into effect, Coastal Permits are obtained, and the building permit process is complete.

2. The Planning Commission can deny the appeal.

   The applicant could revise his plans to comply with current zoning ordinance requirements or wait for the Ordinance to become effective and reapply for a building permit.

RECOMMENDATION

STAFF RECOMMENDS THAT the Planning Commission continue the appeal hearing until after the Ordinance's effective date, and then dismiss the appeal as moot.

Attachments:

1. Location Map
2. Permit Correction Letter
3. Appeal documents filed by the applicant on September 30, 2014

ATTACHMENT 1

LOCATION MAP

Appeal of B14-1374
1880 N. El Camino Real, Space 22

ATTACHMENT 2

City of San Clemente
Community Development

Michael Jorgensen, Building Official
Phone: (949) 361-6170 Fax: (949) 361-8281
jorgensenm@san-clemente.org

September 22, 2014

Mr. Eric Anderson
Park Manager
1880 N. El Camino Real
San Clemente, CA 92672

Subject: **City Plan Review (1st Review)**
Permit Application B14- 1374
Application to Replace an Existing 900 square foot Mobilehome with a New 1,248 square foot Mobilehome within the Capistrano Shores Mobilehome Park Located at 1880 N. El Camino Real – Space #22

Dear Eric:

This information is being provided to you because you have been identified as the point of contact on the permit application. The Building and Planning Divisions have completed their fist review.

As you may be aware, Sean Nicholas, Associate Planner is out of the office due to an unfortunate death in his family. In order to avoid any further delay with the review of your project I am forwarding Planning comments in this letter.

Building Division Comments
The Building Division has reviewed the proposed improvements for compliance with Title 25, Chapter 2 Mobilehome Parks and Installations and corrections dated August 26, 2014 are attached.

Planning Division Comments

1. Please identify the space number on the site plan.

2. The proposed replacement of the existing 900 square foot mobilehome with a new 1,248 square foot mobilehome does not comply with San Clemente Municipal Code Section 17.72.060 Nonconforming Use restrictions.

The proposed replacement mobilehome constitutes a 348 square foot (39%) increase in the square footage of the existing mobilehome, which is a nonconforming use. The current zoning code does not allow the expansion of nonconforming uses.

Please make the necessary changes to your project prior to resubmitting and provide a written respond to each correction when resubmitting your project. Responses should include how the correction was resolved and where information has been shown when resubmitting.

Sincerely,

Michael Jorgensen, PE, CBO
Building Official

Cc: Erik Sund, Acting City Manager
Jim Holloway, Community Development Director
Sean Nicholas, Associate Planner
Jeff Oderman, City Attorney
Peter Howell, Rutan & Tucker

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CITY OF SAN CLEMENTE
BUILDING DIVISION
Plan Review Correction List
Single Family Residence/Duplex/Garage
APPLIES TO PROJECTS SUBMITTED ON OR AFTER JANUARY 1, 2014

City Applicant ☐

CONTACT INFORMATION:

Project Address:	**1880 N. El Camino Real #22**	Plan Check #:	B14-1374-1st PC
Owner:	**Wills Revocable Living Trust**	Phone:	714-473-3058
Architect / Designer:		Phone:	
Engineer:		Phone:	

PROJECT INFORMATION:

Use of Building:	SFR	Occupancy:	R3
Type of Construction:	VB - sprinkled	Area:	1248 s.f.
Estimated Construction Valuation:	$		

GENERAL INFORMATION
- Make all corrections listed below
- Resubmit revised/corrected plans
- Submit a response list that indicates how each correction was resolved
- The plans examiner is available for conferences and telephone calls Monday through Friday between the hours of 8 a.m. to 12:30 p.m. and 1:30 p.m. to 5 p.m. Appointments are recommended.

Corrections below are to be made on plans before permit is issued. The approval of plans and specifications does not permit the violation of any section of the Building Code or other City Ordinance or State Law. The following list does not necessarily include all errors and omissions. See Chapter 1, Division II, Section R105.4 of the latest California Residential Code. **Return this correction sheet with original and corrected plans with a response to each correction.**

2013 CALIFORNIA CODES (applicable to all projects applied for on or after January 1, 2014):
California Residential Code (CRC) *based on the 2012 edition of the International Residential Code (IRC)*
California Building Code (CBC) *based on the 2012 edition of the International Building Code (IBC)*
California Plumbing Code (CPC) *based on the 2012 Uniform Plumbing Code (UPC)*
California Mechanical Code (CMC) *based on the 2012 Uniform Mechanical Code (UMC)*
California Electrical Code (CEC) *based on the 2011 National Electrical Code (NEC)*
California Energy Code *2013 Edition*
California Green Building Standards Code *2013 Edition*

Plan Review Clearance required from:
☐ Planning Division
☐ Engineering Division
☐ Orange County Fire Authority (OCFA)
☐ Other: HOA

Respond to each of the following comments in writing with response to each item number that outlines how each correction has been resolved and where it may be found on the plans.

Incorporate (IMPRINT) the following missing information ON THE PLANS:

☑ **2013 CALGreen Code Residential Mandatory Measures Checklist.**

PLAN REVIEW CORRECTIONS:

1. Show location of equipment to supply power within four feet of the proposed location of the unit. Title 25, Chapter 2, Section 1184

2. Show location of gas riser outlet terminating within four feet of the proposed location of the unit. Title 25, Chapter 2, Section 1222

3. Show location of water outlet within four feet of the proposed location of the unit. Title 25, Chapter 25, Section 1274(B)

4. Submittal does not indicate any accessory structures, i.e. steps, landing, porches, carports, etc. Any item mentioned would require separate plans and permits which have not been provided at this time.

5. Where the mobile home swings inward or is a sliding door, the landing, porch or top step of the stairway may not be more than 7-1/2 inches below the door. The width of the landing, porch or top step of the stairway shall comply both with subsection (a) of this section and not be less than the width of the door opening. Title 25, Chapter 2, Section 1498(d)

6. At the time of the mobile home unit installation inspection, all existing doorways of an mobile home unit shall be provided with a porch, ramp and/or stairway. Title 25, Chapter 2, Section 1368. Show compliance on plans.

❑ **Corrected plans are to be logged in for recheck.**

Thank you in advance for your cooperation!

Robert Hernandez	(949) 361-6167
PLAN CHECK STAFF	PHONE
	(949) 361-
PLAN CHECK STAFF	PHONE

1st Review Date:	08/26/2014	By:	Robert Hernandez
2nd Review Date:		By:	
3rd Review Date:		By:	
Approved By:		By:	

(See attached ___ sheets of additional information)

ATTACHMENT 3

City of San Clemente

NOTICE OF APPEAL
CITY OF SAN CLEMENTE

Appellant's Name: Capistrano Shores, Inc.; Wills Revocable Living Trust dated 11/23/99

Appellant's Address: 1880 N. El Camino Real

San Clemente, CA 92672

Appellant's Phone Number: (949) 351-9642

Decision Being Appealed: Denial of Permit for Installation of Mobilehome Located on Space 22

Decision Made By: Community Development Department

Date of Decision: September 22, 2014

State basis for the appeal. (Note: only grounds for appeal noted here will be permitted to be raised before the appellate body. Failure to state grounds for appeal will waive the Appellant's ability to raise that issue at the appellate hearing.)

Please See Attachment "A".

Appellant's signature:

Received
SEP 2014
Building Division
City of San Clemente
930 am

ATTACHMENT "A'" TO APPEAL
STATEMENT OF BASIS FOR
APPEAL FROM DENIAL OF PERMIT REQUEST TO APPROVE A MANUFACTURED HOME INSTALLATION
UNDER THE CITY OF SAN CLEMENTE'S ASSUMPTION OF THE ENFORCEMENT RESPONSIBILITIES FOR THE MOBILEHOME PARK ACT
(Cal. Health & Safety Code §§ 18200 et seq.)

This appeal is taken from the City of San Clemente Planning Division response effecting a categorical denial of a manufactured home installation permit to be issued by the City, acting on behalf of the State of California, as a local enforcement agency for the Mobilehome Parks Act, Cal. Health and Safety Code § 18200 *et seq.,* (the "**Mobilehome Parks Act**" or "**MPA**").

The general issues relevant in this appeal are, as to the issuance of MPA permits within Capistrano Shores Mobilehome Park (the "**Park**") (i) the Mobilehome Parks Act preempts local zoning ordinances; (ii) the City of San Clemente (the "**City**") has not fulfilled its obligations as the enforcement agency on behalf of the State of California (the "**State**") under the Mobilehome Parks Act, and (iii) the City's recital and explanation of the zoning history of Capistrano Shores Mobilehome Park is incorrectly represented, and regardless, the 1996 zoning ordinance is void as a matter of law.

The City's contrary position to the enumerated issues above is an improper basis for the denial of the permit application. The disputed issues relate solely to the legal relationship between the City and the California state statutes and implementing regulations governing the voluntary acceptance of local enforcement authority under the as well as the Manufactured Housing Act at Cal. Health and Safety Code § 18200 *et seq.,* (the "**Manufactured Housing Act**" or "**MHA**"), and related regulations including without limitation 25 Cal. Code of Regulations § 1 *et seq.,* ("**Title 25**"); or to the attempt by the City to take the property owned by 90 San Clemente residents by attrition through non-approval of permits based upon zoning.

This appeal is based upon the record hereby incorporated as though fully set forth herein, including without limitation: the list of correspondence; the exhibits or attachments to each correspondence between this office and City staff, Planning Commissioners and City Council, attached hereto as **Exhibit 1**; the City permit files for each and every mobilehome located within the Park; the public records, communication, and oral comment at City Planning and City Council Hearings including without limitation: June 14, 2012; November 15, 2012; January 9, 2013; February 6, 2013; May 12, 2013; September 11, 2013; the meeting minutes for the General Plan Committee and the Coastal Plan Committee for years 2008 through December 19, 2013; all written, electronic, or spoken communications, notes, comments, or memorandums between and among staff, excepting the City Attorney, related to Capistrano Shores Mobilehome Park and/or any mobilehome within the Park from 2005 to the current date; the City's files for Capistrano Shores spaces 12, 22, 23, 75, 80, 81, and 90; and the full text by reference to the City's General Plans and zoning ordinances from 1959 to the current date.

SECTION 1.
DENIAL OF PERMIT REQUEST

On September 22, 2014, the City Plan Review (the "**Plan Review**") was issued with regard to the Title 25 Permit Application for a replacement mobilehome installation located at 1880 N. El Camino Real, Space 22 (the "**Application** or "**Installation Application**"), which Application is attached hereto as **Exhibit 8**. The subject property is located within the Park.

The City Plan Review included comments from both Building Division and Planning Division. Planning's review was as follows (hereinafter, the "**Comment**"):

> "The proposed replacement of the existing 900 square foot mobilehome with a new 1,248 square foot mobilehome does not comply with San Clemente Municipal Code Section 17.72.060 Nonconforming Use restrictions. The proposed replacement mobilehome constitutes a 348 square foot (39%) increase in the square footage of the existing mobilehome, which is a nonconforming use. The current zoning code does not allow the expansion of nonconforming uses."

The Comment on the Plan Review mirrors correspondence dated November 19, 2013 (hereinafter, the "**Goldfarb Letter**"), from Jeffrey A. Goldfarb ("**City Attorney**") to Mr. Charles Lester, Executive Director of the California Coastal Commission, which is incorporated herein by reference, setting forth the reasons that this, as well as prior and future installation applications have been denied by the City.

The Plan Review and Goldfarb Letter are collectively referred to as the "**Denial**", and attached hereto as **Exhibit 2.** It bears mention that at the date of the Goldfarb Letter, Mr. Goldfarb neglected to provide a copy of the either to the applicant coach owner in Space 22, or to Capistrano Shores, Inc., a California non-profit mutual benefit corporation ("**CSI**") as the landowner, whether at its address for notice or through its representative Mr. Eric Anderson, who has made regular contact with the City throughout the application process. Mr. Goldfarb also apparently neglected to copy the California Department of Housing and Community Development, despite operating as its agent under California Health and Safety Code Sec. 18300.

In the Goldfarb Letter, the City Attorney clearly states it seeks denial of any application based on an inconsistent General Plan designation and application of the City's nonconforming use ordinance—the same ordinance cited in the Comment to the Plan Review for Space 22.

Capistrano Shores, Inc., a California nonprofit mutual benefit corporation, owner of the Park, is comprised of owners of the mobilehomes located in the Park. CSI as Park owner, together with the applicant owner of the mobilehome located on Space 22, hereby appeal the denial of the Installation Application. Pursuant to the Consent and Assignment, attached hereto as **Exhibit 3**,

CSI is authorized to bring this Appeal on behalf of itself and the owner of the mobilehome located on Space 22.

SECTION 2
GENERAL DESCRIPTION OF THE TRANSFER OF OWNERSHIP TO THE RESIDENTS ON JANUARY 25, 2008

Simply stated, the residents of Capistrano Shores Mobilehome Park are the owners of Capistrano Shores Mobilehome Park.

Prior to the purchase of the land and improvements by the residents, the land was owned by Amherst College and the leasehold for operation and maintenance of the Park was owned by Capistrano Shores LLC, an entity unrelated to the current ownership. Through a corporate acquisition, the residents purchased *both* the land and the leasehold interest thereby combining (merging) the two types of ownership for the mobilehome park on January 25, 2008. This grant deed is attached hereto as **Exhibit 4**.

Capistrano Shores, Inc. is the entity which owns Capistrano Shores Mobilehome Park. The purpose of CSI, as a mutual benefit nonprofit corporation, is to benefit the owners of the mobilehomes located within the Park. The members/investors of CSI are owners of the mobilehomes located on the 90 spaces. The 90 resident households owned their mobilehomes before the purchase of the Park and continue to own the mobilehomes now. Again, CSI does not own mobilehomes. Individual resident households continue to own the mobilehomes.

This Appeal directly or indirectly affects all 90 households today, and will directly affect all 90 households over time.

Capistrano Shores Mobilehome Park qualifies as a **"resident owned mobilehome park"** pursuant to Cal. Civil Code § 799(c): *"Resident-owned mobilehome park" means* ***any entity other than*** *a subdivision,* ***cooperative****, or condominium for mobilehomes through which the residents have an ownership interest in the mobilehome park."*

The Applicants for the permit under Mobilehome Park Act for a mobilehome replacement installation were, and are, owners of the mobilehome located on Space 22 and Members/Investors in CSI.

The Park operates under a conditional use permit issued September 1959, as evidenced by the 1959 Resolution of Approval, attached hereto as **Exhibit 5**. At that time, the property was zoned S-1. Mobilehomes and mobilehome parks were a permitted use with a conditional use permit. As recent as 1993, the S-1 Zone provided only one development standard: a height not to exceed 25 feet. *"The S-1 zone covers the San Clemente's beaches, along the entire length of the City." See* **Exhibit 6,** Plan Review from Kelly Main, Associate Planner, dated December 9, 1993. As of December 9, 1993, mobilehomes and a mobilehome park remained a conforming use on the CSI property, pursuant to the original conditional user permit.

In spite of this history, the City Attorney, in the Goldfarb Letter, asserts that the Park was a non-conforming use since 1986.

In light of Mr. Goldfarb's misrepresentation of the history of the Park, and stated intent to reject HCD's interpretation of the City's obligations as an HCD agent, and the City's response to the instant Application, we hereby incorporate the Loftin Firm correspondence to Jeffrey Goldfarb dated December 13, 2013, and all attachments thereto. *See* Exhibit 1, *infra*. These represent a response to the City's position statement represented by the Goldfarb Letter, which has been again demonstrated by the City's in Plan, which not only effect a denial, but also represent the futility of any application for a manufactured home installation, by residents in Capistrano Shores Mobilehome Park, before the City.

The Park also receives an annual Housing and Community Development "Permit to Operate" issued by the City of San Clemente, in the City's role as the local enforcement agent ("**LEA**") under the Mobilehome Park Act. The Permit to Operate, attached hereto as **Exhibit 7**, specifically acknowledges that mobilehomes and recreational vehicles are permissible on the property.

SECTION 3.
APPLICATION FOR PERMIT FOR MANUFACTURED HOME INSTALLATION

On August 21, 2014, the City received the Permit Application for the manufactured home installation for Space 22, attached hereto as **Exhibit 8.** The Permit Application has been advanced by the owners of the mobilehome at Space 22 (the "**Applicant**"), in Capistrano Shores Mobilehome Park.

It is the City's obligation under the Mobilehome Park Act to review applications for installations and to inspect the installations when complete. *See* "Duties" Cal. Health & Safety Code § 18300(b), §§ 18400-18407. The Planning Division and City Attorney assert that the City does not have to fulfill its obligations under the Mobilehome Park Act because the City's zoning ordinances preempt state law, including the MPA and MHA or in the alternative, that compliance with the Coastal Act is required prior to any initial application for an installation permit under the MPA and MHA. The Applicant disagrees with this position.

For further discussion of these issues, please see the letter from The Loftin Firm, dated December 13, 2013 to the Jeffrey Goldfarb, City Attorney, attached hereto and incorporated herein by reference.

The inevitable factual and legal conclusions are that the Manufactured Housing Act is exclusively the jurisdiction of HCD and the City has not fulfilled its duties and obligations under the Mobilehome Park Act acting as the enforcement agency, for said Act, as an agent on behalf of the State of California. In light of previous, direct instruction by HCD detailed below, the City's acts are without plausible foundation, and constitute an arbitrary and capricious act to injure mobilehome owners and residents of the City of San Clemente.

SECTION 4
THE MOBILEHOME PARK ACT AND ITS IMPLEMENTING REGULATIONS PREEMPT LOCAL JURISDICTION AND ORDINANCES, INCLUDING WITHOUT LIMITATION, ZONING LAWS AND THE CITY'S NONCONFORMING USE ORDINANCE.

The regulation of Mobilehome Parks is exclusively the purview of the California Department of Housing and Community Development. As the California Court of Appeal explained in *Sequoia Park Associates v. County of Sonoma:*

> [I]n 1967, the state enacted the Mobilehome Parks Act (Health & Saf. Code, §§ 18200-18700), which regulates the construction and installation of mobilehome parks in the state. (See *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483, 1489-1490 [26 Cal.Rptr.3d 543].) In this act, the Legislature expressly stated that it "supersedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part." (Health & Saf. Code, § 18300, subd. (a).) The few exemptions from this prohibition are carefully delineated.[3]
>
> Then there is the Manufactured Housing Act of 1980 (Health & Saf. Code, §§ 18000-18153), which regulates the sale, licensing, registration, and titling of mobilehomes. The Legislature declared that the provisions of this measure "apply to all parts of the state and supersede" any conflicting local ordinance. (Health & Saf. Code, § 18015.) The Department of Housing and Community Development (HCD) is in charge of enforcement. (Health & Saf. Code, §§ 18020, 18022, 18058.)
>
> These statutory schemes indicate that the state is clearly the dominant actor on this stage. Under the Mobilehome Parks Act, it is the HCD, a state agency, not localities, that was entrusted with the authority to formulate "specific requirements relating to construction, maintenance, occupancy, use, and design" of mobilehome parks (Health & Saf. Code, § 18253; see also Health & Saf. Code, §§ 18552 [HCD to adopt "building standards" and "other regulations for . . . mobilehome accessory buildings or structures"], 18610 [HCD to "adopt regulations to govern the construction, use, occupancy, and maintenance of parks and lots within" mobilehome parks], 18620 [HCD to adopt "regulations regarding the construction of buildings in parks that it determines are reasonably necessary for the protection of life and property"], 18630 [plumbing], 18640 ["toilet, shower, and laundry facilities in parks"], 18670 ["electrical wiring, fixtures, and equipment . . . that

it determines are reasonably necessary for the protection of life and property"].)

At present, the HCD has promulgated hundreds of regulations that are collected in chapter 2 of division 1 of title 25 of the California Code of Regulations. (Cal. Code Regs., tit. 25, §§ 1000-1758.) The regulations exhaustively deal with a myriad of issues, such as "Electrical Requirements" (*id.*, §§ 1130-1190), "Plumbing Requirements" (*id.*, §§ 1240-1284), "Fire Protection Standards" (*id.*, §§ 1300-1319), "Permanent Buildings and Commercial Modulars" (*id.*, §§ 1380-1400), and "Accessory Buildings and Structures" (*id.*, §§ 1420-1520). The regulations even deal with pet waste (*id.*, § 1114) and the prohibition of cooking facilities in cabanas (*id.*, § 1462).

Once adopted, HCD regulations "shall apply to all parts of the state." (Health & Saf. Code, § 18300, subd. (a).) Mobilehomes can only be occupied or maintained when they conform to the regulations. (Health & Saf. Code, §§ 18550, 18871.) Enforcement is shared between the HCD and local governments (Health & Saf. Code, § 18300, subd. (f), 18400, subd. (a)), with HCD given the power to "evaluate the enforcement" by units of local government. (Health & Saf. Code, § 18306, subd. (a).) A locality may decline responsibility for enforcement, but if assumed and not actually performed, its enforcement power may be taken away by the HCD. (Health & Saf. Code, § 18300, subds. (b)-(e).) Local initiative is restricted to traditional police powers of zoning, setback, permit requirements, and regulating construction of utilities. (Gov. Code, § 65852.7; Health & Saf. Code, § 18300, subd. (g), quoted at fn. 3, *ante.*)

It is the state that determines which events and actions in the construction and operation of a mobilehome park require permits. (Health & Saf. Code, §§ 18500, 18500.5, 18500.6, 18505; Cal. Code Regs., tit. 25, §§ 1006.5, 1010, 1014, 1018, 1038, 1306, 1324, 1374.5.) Even if the locality issues the annual permit for a park to operate, a copy must be sent to the HCD. (Cal. 1282*1282 Code Regs., tit. 25, §§ 1006.5, 1012.) It is the state that fixes the fees to be charged for these permits and certifications (Health & Saf. Code, §§ 18502, 18503; Cal. Code Regs., tit. 25, §§ 1008, 1020.4, 1020.7, 1025), and sets the penalties to be imposed for noncompliance (Health & Saf. Code, §§ 18504, 18700; Cal. Code Regs., tit. 25, §§ 1009, 1050, 1370.4). Sometimes, the state assumes exclusive responsibility for certain

> subjects, such as for earthquake-resistant bracing systems. (Cal. Code Regs., tit. 25, § 1370.4, subd. (a).)
>
> Additional provisions respecting mobilehome parks are in the Government Code. Cities and counties cannot decide that a mobilehome park is not a permitted use "on all land planned and zoned for residential land use as designated by the applicable general plan," though the locality "may require a use permit." (Gov. Code, § 65852.7.) "[I]t is clear that the Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions [in Health and Safety Code section 18300, subdivision (g), quoted at footnote 3, *ante*] of where a mobilehome park may be located, vehicle parking, and lot lines, not the structures within the parks." (*County of Santa Cruz v. Waterhouse, supra,* 127 Cal.App.4th 1483, 1493, italics omitted.) A city or county must accept installation of mobilehomes manufactured in conformity with federal standards. (Gov. Code, § 65852.3, subd. (a).) Their power to impose rent control on mobilehome parks is restricted if the park qualifies as "new construction." (Gov. Code, § 65852.11, subd. (a); cf. text accompanying fn. 2, *ante.*)
>
> This survey demonstrates that the state has a long-standing involvement with mobilehome regulation, the extent of which involvement is, by any standard, considerable.
>
> 176 Cal. App. 4th 1270, 1280-1282 (Cal. Ct. App. Dist. 1 Div. 2, 2009) **Exhibit 12.**

However, this precedent is not "new" information to the City of San Clemente. On previous occasions, the California Department of Housing and Community Development met or communicated directly with City Staff to explain the strict limits on cities acting as enforcement jurisdictions pursuant to Cal. Health and Safety Code § 18300 and 18860.

The letter dated March 26, 2009, sent from Kim Strange to the City of San Clemente, clearly delineates that notwithstanding the City's asserted conflict with general plan designation, the City's asserted conflict resulting from "downzoning" Capistrano Shores, and City's application of a Nonconforming Use Ordinance as a result of the change in zoning, *and without consideration for the actionable due process claims of Capistrano Shores relating to the failure of notice relating to the above*:

> "the City's ordinance is preempted by a combination of the MPA and the Manufactured Housing Act of 1980 ("MHA") because the MPA entirely occupies the field of mobilehome park construction, maintenance, use and occupancy, including the nature of the

> structures that occupy spaces within a park; and the MHA occupies the filed of manufactured home construction standards.
>
> As a result, a local ordinance cannot be interpreted or applied to regulate the nature of the structures permitted to occupy spaces within a mobilehome park (such as prohibiting a two-story home). Further, *"where a park already has been established, a locality cannot apply the zoning powers it traditionally uses to regulate nonconforming uses if those regulations encroach into areas regulated by the MPA and MHA."*
>
> Memorandum to Kim Strange, Deputy Director, Division of Codes and Standards from Dennis L. Beddard, Chief Counsel Department of Housing and Community Development, March 26, 2008, Pg. 1 (emphasis added), attached hereto as **Exhibit 13.**

However, even going back to 2008, the City of San Clemente was informed via Department of Housing and Community Development, Information Bulletin 2008-10, attached hereto as **Exhibit 14**, that the MPA "contains an express preemption, with minimal express authority for local ordinances [affecting mobilehome parks]. In addition, the Legislature's findings support its intent to allow only very restrictive authority for local government action within the boundaries of a mobilehome park." HCD Information Bulletin 2008-10, Pg. 2.

While this Plan Review cites local zoning authority, it is clear that "the Department's statutory and regulatory standards impose standards for *virtually every aspect of a park's or a manufactured home's physical conditions,* except for those expressly left to local government action in subdivision (h) of H&SC section 18300." HCD Information Bulletin 2008-10, Pg. 3. The Plan Review continues to differentiate between "local government approvals" as opposed to an "MPA enforcement agency permit and inspections (25 CCR § 1018)." Local government action [approvals] only relates to "construction of a new or expanded park, or installation of multifamily manufactured housing." HCD Information Bulletin 2008-10, Pg. 3.

To conclude this section, we add one final point. Kim Strange, Deputy Director for the HCD Codes and Enforcement, wrote in the March 26, 2009 correspondence to the City:

> "...given our belief that the City's denial of the approval was based on a good faith misinterpretation of the applicable laws, I will not, at this time, address the potential administrative or judicial remedies applicable to noncompliance with the Mobilehome Parks Act by a local enforcement agency. It is our expectation that, upon review of the enclosed opinion, the City will comply with the applicable laws." **Exhibit 15.**

Four years later, it is difficult to give the City the same benefit of the doubt with the City's denial of the instant Application, together with the Goldfarb Letter and an overwhelming history of

mischaracterizing other applications. For this reason, we intend to invite the Department of Housing and Community Development's comment as to administrative and judicial remedies, and venture that the City's continued denial of mobilehome installation/replacement permits would be an arbitrary and capricious act, and a failure to perform a ministerial duty under the Cal. Health and Safety Code § 18300 and 25 Cal. Code of Regs. § 1018.

SECTION 5
THE MOBILEHOME PARK ACT AND ITS IMPLEMENTING REGULATIONS CONTROL THE CONSTRUCTION, REPAIR, AND MAINTENANCE OF THE INTERIOR OF A MOBILEHOME PARK.

As discussed previously, in *Sequoia Park Associates v. County of Sonoma*, 172 Cal. App. 4th 1270, ("*Sequoia*") and in Department of Housing and Community Development Information Bulletin 2008-10, and in March 26, 2009 correspondence from the California Department of Housing and Community Development's Deputy Director, the City must refrain from withholding "MPA Enforcement Agency approvals" it is otherwise obligated to issue under Cal. Health and Safety Code § 18300, 25 Cal. Code of Regulations § 1018, and related statutes.

However, even prior to the jurisprudence and communication cited above, the California Court of Appeals decided *County of Santa Cruz v. Waterhouse*, where the Court of Appeals held that the Mobilehome Parks Act, ("**MPA**") Cal. Health and Safety Code § 18200 preempts a conflicting local ordinance which restricts multistory mobilehomes. 127 Cal. App. 4th 1483 (Cal. Ct. App. 6th Dist., 2005) ("*Waterhouse*"). **Exhibit 16.** There, the County of Santa Cruz adopted an ordinance that prohibited mobilehomes within mobilehome parks from exceeding one story or 17 feet in height. The Waterhouse court explained, much like the Sequoia court, that "A local ordinance will be preempted if it conflicts with state law, and a conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication…" *Waterhouse,* 127 Cal. App. 4th at 1489 *citing Sherwin Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893, 16 (1993).

The *Waterhouse* court continued, finding the MPA both expressly and impliedly preempts conflicting regulation to 'assure the "health, safety, general welfare, and…decent living environment of the residents" as well as protect the investment value of mobilehomes' as implemented through HCD standards for "construction, maintenance, occupancy, use, and design of parks." *Waterhouse,* 127 Cal. App. 4th at 1489 *citing* Cal. Health and Safety Code § 18250-18251.

This is reasonable, the *Waterhouse* court explained, because "The Legislature's goal of promoting uniformity in mobilehome construction and installation standards impliedly demonstrates that California fully occupies the area of mobilehome regulation. Indeed, the goal of uniformity *can only be achieved through the centralized regulatory power of the HCD. Without such centralized regulation, mobilehome owners would be subject to the specific and particularized whims of a local county or municipality…" Id.* at 1489-1490 (emphasis added).

The *Waterhouse* court reasoning instills faith in the efficacy of state laws promulgated by our duly elected state legislature, speaking on behalf of its constituents. A person with any mobilehome complying with the centralized regulations of HCD should be able to move their home to any mobilehome park in the state—regardless of the differences in material, construction, shape, occupancy, appearance, and the "particularized whims of a local county or municipality."

Despite the Legislature's express intent, recited by *Waterhouse*, and again cited in *Sequoia*, and again cited in the HCD Information Bulletin 2008-10, and again cited in the HCD Deputy Director's 2009 communication to the City of San Clemente, the City's Planning response and Goldfarb Letter fails to cite *any* of this jurisprudence, much less to acknowledge that the City is exceeding its jurisdiction with regard to a local enforcement agency permit under an HCD approval, pursuant to Cal. Health and Safety Code § 18300 and 25 Cal. Code of Regulations 1018.

The Goldfarb Letter is also a clear statement of intent to take the property and close Capistrano Shores Mobilehome Park. We anticipate the City will assert that the jurisprudence cited in this Appeal does not apply because the City changed the General Plan designation and zone designation for the Park. However, as clearly indicated in the State statutes and regulations governing the Park, and in applicable jurisprudence dismissing similar arguments to those the City is advancing now, the City's failure to perform its ministerial duty in approving mobilehome installations in the Park, and the City's on-going regulatory abuses appear as an intent to take the property for City open space use and remove the homes of 90 residents. The damage for the loss of property and mobilehomes will most certainly exceed two hundred seventy million dollars ($270,000,000.00).

SECTION 6
THE CITY ASSUMED THE RESPONSIBILITY FOR ENFORCING THE MOBILEHOME PARK ACT AND IMPLEMENTING REGULATIONS FROM THE STATE, AND HAS FAILED TO EXERCISE THOSE OBLIGATIONS.

The City of San Clemente has assumed the role of Local Enforcement Agent ("**LEA**") of the California Department of Housing and Community Development ("**HCD**") pursuant to Cal. Health and Safety Code §18300. As an LEA, it is the City's responsibility to enforce the Mobilehome Parks Act and its related regulations.

Since 2007, the City has continued to improperly withhold approval of improvement applications within the Park by either wrongly claiming that the City's nonconforming use ordinance superseded the City's duties under Cal. Health and Safety Code § 18300 as an MPA LEA, and City's the nonconforming use ordinance preempts state statutes, or alternatively, that no permit could be approved given a change in the general plan designation and zoning, allegedly applicable to the Park, pursuant to a 1993 General Plan revision and 1996 zoning ordinance whereby the Park was "down-zoned" from S-1 to OS-S2(CZ)—a designation reserved for private, natural, unspoiled open space. Residential dwellings, including mobilehomes, are not permitted in the OS-S2 (CZ) zone.

Regardless of the questioned validity for this change in zoning, the City's refusal to issue permits is an abuse of its discretion, under the MPA, as an LEA–an agent of HCD. *See* City Attorney November 19, 2013 correspondence, **Exhibit 2.**

HCD was asked specifically whether the City's conflicting zoning and nonconforming use ordinance had any bearing on the issuance of LEA permits in Capistrano Shores. The Deputy Director for HCD stated unequivocally that the MPA preempts or takes precedent over the City's zoning ordinance with regard to already-existing parks like Capistrano Shores. In other words, these parks have a right to exist notwithstanding any attempts by local jurisdictions to "downzone" them, consistent with the comprehensive statutory scheme and legislative intent behind the MPA, the MHA, and specific regulation of local zoning establishing a right for mobilehome parks to exist. *See, e.g.* California Government Code § 65852.7. HCD supported this position by providing a legal memorandum prepared by attorneys for the State of California, delineating the express and implied MPA preemption, attached hereto as **Exhibit 15:**

> "[t]he provisions of the MHA [Manufactured Housing Act] supersede any ordinance enacted by a local government which conflicts with the provisions of the MHA. Additionally, a manufactured home or mobilehome which meets the standards of the MHA and implementing regulations is not required to comply with any local ordinance prescribing requirements in conflict therewith."
>
> The MHA establishes construction standards for mobilehomes, manufactured homes, and two-story manufactured-homes.

> Therefore, to the extent that the provisions of the City's [zoning] ordinance pertaining to the repair, maintenance, or replacement of a manufactured home or mobilehome conflict with the MHA and its implementing regulations, the City's requirements are preempted...
> Thus, any attempt by a locality to distinguish between permissible or impermissible types of manufactured homes or mobilehomes, or to limit installation of a "mobilehome" or "manufactured home" to a single-story structure for purposes of imposing constructions, repair, replacement, or maintenance standards by the MHA.
> Letter from Kim Strange Dated March 26, 2009, attached hereto as **Exhibit** 15 pages 12-13.

HCD has made its decision. Regardless of any change in the underlying general plan designation and zoning, a permit application pertaining to a mobile or manufactured home is controlled by the requirements of the MHA. If such an application meets the requirements, HCD has stated that the requested permit should be issued by the City, who has voluntarily subjected itself to the jurisdiction of the HCD. As the LEA, the City's continued refusal to issue permits is a blatant abuse of its discretion.

SECTION 7

THE CONSTRUCTION, MAINTENANCE AND REHABILITATION OF A MOBILE/MANUFACTURED HOME IS CONTROLLED BY THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT OF 1974, 42 U.S.C. 5401 ET SEQ. AND IMPLEMENTING REGULATIONS AT 24 CFR PART 3280 AND PART 3282, IMPLEMENTED BY THE STATE UNDER THE MANUFACTURED HOUSING ACT, WHICH IS UNDER THE EXCLUSIVE JURISDICTION OF HCD.

When the City of San Clemente has refused to perform its ministerial duty under the Mobilehome Parks Act, under which it voluntarily engaged itself pursuant to Cal. Health and Safety Code § 18300, it has not only attacked the rights of mobilehome owners in Capistrano Shores, and flouted the jurisdiction, authority, and regulations of its principal, the California Department of Housing and Community Development, its principal has interfered with the underpinnings of a federal scheme intending a uniform, system of fungible mobile and manufactured homes which crosses state lines and implicates interstate commerce. To this end, in 1974, Congress enacted the National Manufactured Housing Construction and Safety Standards Act (the "**NMHCSSA**") in order to establish a set of national construction and safety standards for manufactured homes. 42 U.S.C. § 5401, et seq. (1974).

The purpose of the NMHCSSA, among other things, was "to protect quality, durability, safety, and affordability of manufactured homes; . . . to provide for the establishment of practical, uniform, and, to the extent possible, performance-based Federal construction standards for manufactured homes; . . . [and] to protect residents of manufactured homes with respect to personal injuries and the amount of insurance costs and property damages in manufactured housing[.]" 42 U.S.C. § 5401(b) (1974). The NMHCSSA directs the Secretary of the Department of Housing and Urban Development ("HUD") to create regulations imposing "high standards of protection" for manufactured homes and their component parts. 42 U.S.C. § 5403(a)(1) (1974).

HUD standards cover "all equipment and installations in the design, construction, transportation, fire safety, plumbing, heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units." 24 C.F.R. § 3280.1(a) (1975). *Gonzalez v. Drew Indus.*, 750 F. Supp. 2d 1061, 1065-1066 (C.D. Cal. 2007) **Exhibit 17.**

Under the NMHCSSA, an express preemption provision leaves no doubt of Congressional intent to preempt certain areas of the manufactured housing industry, including conflicting state and local regulations.

The preemption provision precludes state and local regulations that impose standards that are not identical to the federal standards:

> Supremacy of Federal standards.
>
> Whenever a Federal manufactured home construction and safety standard established under this title [42 USCS §§ 5401 et seq.] is

> in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard. Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this title 42 U.S.C. 5403(d)(1974). The Act's preemption clause makes clear Congressional intent to preempt State law in certain areas of manufactured housing, and the clause also instructs a broad application of the Act's preemptive powers.
>
> The Act's preemption clause gives specific instructions that State law standards are preempted by the Act. The language quoted above focuses on the preemption of any State "standard regarding construction or safety . . . which is not identical to the Federal manufactured home construction and safety standard." Id. (emphasis added).
>
> *Gonzalez v. Drew Indus.,* 750 F. Supp. 2d 1061, 1066-1067 (C.D. Cal. 2007)

The Manufactured Housing Act at California Health and Safety Code § 18000 et seq., and particularly at Cal. Health and Safety Code § 18015, and related regulations of the California Department of Housing and Community Development at 25 Cal. Code of Regs. § 4000 et seq., demonstrate an intent to comply with the uniform federal standards set forth in the NMHCSSA, particularly at 25 Cal. Code of Regs. § 4000(b):

> "Pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (Title VI of Public Law 93-383, 88 Statute 700, 42 U.S.C. 5401, et seq.) [the Department of Housing and Community Development] is authorized responsibility for administration and enforcement of Manufactured Home Procedural and Enforcement Regulations and Construction and Safety Standards relating to any issue with respect to which a Federal standard (Title VI (24 C.F.R.) requirement) has been established."

This is of particular relevance to the Space 22 mobilehome installation application, as the NMHCSSA discusses installations in 42 USCS § 5404, where it apportions to the State responsibility for setting uniform standards consistent with Federal law,, and reiterates that the standards "shall be consistent with the design of the manufacturer." 42 USCS § 5403.

Here, the State of California is directly responsible for ensuring that mobilehomes approved for use throughout the state and related installations are consistent with the purposes of the NMHCSSA, and are applied consistently so as to not interfere with the concerns of interstate commerce, which have been set forth in federal legislation. The City of San Clemente has assumed this obligation to enforce the federal legislation—by assuming the HCD's obligations under the MPA. The City of San Clemente's failure to fulfill its duties and obligations to the state and federal government and its interference with this mobilehome installation application, under MPA authority, not only disregards the burden which HCD and the City are carrying in complying with Federal law, but it interferes with interstate commerce and the comprehensive, centralized statutory scheme set forth by the state legislature in the MHA and MPA.

SECTION 8
THE CITY ATTORNEY'S LETTER INCORRECTLY STATES THAT THE 1982 GENERAL PLAN RENDERED THE PROPERTY O-A RECREATIONAL WITH NO RIGHT TO IMPROVE THE PARK IN CONTRAVENTION OF THE CITY'S POLICY TO REMOVE, NON-CONFORMING USES, OVER TIME.

To restate the status quo at introduction of the park, S-1 was established as permitting all uses in the R-1 District.

SECTION 18
S-1 SHORELINE DISTRICT

(A) USES PERMITTED:

1. PUBLIC PARKS and recreation facilities and business concessions in connection therewith.

—14—

2. PUBLIC PIERS, jetties, groins, wharfs, harbor works, and appurtenant accessories, provided a conditional permit for same has been secured.

3. All uses permitted in the R-1 District provided there is at least FOUR THOUSAND (4,000) SQUARE FEET of lot area for each dwelling and each lot shall be not less than FIFTY (50) FEET in width.

4. Private clubs and/or commercial bath houses provided a CONDITIONAL PERMIT therefor has been secured.

5. Private or rental cabanas, without kitchens and not suitable for a dwelling, but serving for a TEMPORARY SHELTER and dressing room, with the same sign regulations as are applicable to hotels in the R-3 District.

6. PUBLIC UTILITY LINES, provided they are located within TEN (10) FEET of the existing railroad right-of-way.

7. Establishment and maintenance of tracks and appurtenances of tracks and appurtenant railroad facilities, other than road right-of-way.

S-1 expressly adopts all uses in the R-1 district, which is a residential district.

SECTION 6
R-1, SINGLE FAMILY RESIDENCE DISTRICT

The following provisions shall apply in the R-1 District:

(A) USES PERMITTED:

1. ONE FAMILY DWELLINGS of a permanent character and which shall not be less than 800 SQUARE FEET in area, each placed in a permanent location.

2. AGRICULTURAL AND HORTICULTURAL USES including disposition only of crops produced upon the premises provided no signs, displays, or stands are used in conjunction with such disposition.

3. USUAL ACCESSORIES IN CONNECTION WITH PERMISSIVE USES including non-commercial greenhouses, servants or guests quarters provided same are NOT EQUIPPED WITH A KITCHEN NOR KITCHEN FACILITIES, and garages or automobile storage space, provided that a garage or an automobile storage space shall be provided and maintained and shall have a capacity of at least one, but not more than THREE AUTOMOBILES FOR EACH DWELLING established on the same lot. See Section 19 (K) 2 for hillside provisions.

The definition as a "residential use" is significant. Pursuant to Cal. Gov. Code § 65852.7, 'Cities and counties cannot decide that a mobilehome park is not a permitted use "on all land planned and zoned for residential land use."' *Sequoia Park Associates,* 176 Cal. App. 4th at 1282. The express language of the statute "deems" mobile home parks an allowed use: "**...shall be deemed a permitted land use on all land planned and zoned for residential land use...**" Cal. Gov. Code § 65852.7.

Further, a review of historic uses allowed under R-1 and S-1 contradicts the City Attorney's recital of the zoning at that time. We find no prohibition on trailer parks or mobile home parks in the zoning code relating to residential uses. In fact, the "Ordinance Revision Memorandum" dated November 12, 1981 prepared by the San Clemente Planning Department notes that at least in the residential category, approved uses are often omitted from the list of "permitted uses." By way of example, the San Clemente Planning Department's Plan Review notes that a dedicated "apartment district" does not list apartments as a specific permitted use:

2. The distinction between districts apparently has been lost. For example, the R-2 Duplex Residential District permits not only single-family dwelling units and duplexes but triplexes, and with a use permit, five or more unit dwelling groups. This clearly seems to contradict the purpose of the district as implied by its name. There appears to be only minor functional differences between this district (R-2) and the R-3 Multiple-Family Residential District.

3. The listing of permitted uses seems not to follow any apparent logic. For example, as shown in the table below, the R-3 and R-4 districts specifically allow apartment houses and apartments, respectfully, while the R-3-G, Garden Apartment District, does not list apartments as a specific permitted use.

Based on our review, mobile home parks were "permitted" uses in the S-1 zone, both as they were not expressly prohibited, as S-1 incorporated residential uses in R-1, and any prohibition would be invalid based on Cal. Gov. Code § 65852.7.

The City has also asserted that in 1982, the City amended its General Plan to designate the CSMHP property as "Open Area and Recreation" (O-A), allowing a range of public and private, non-profit recreation uses and facilities. *See* Ordinance 794, a portion of which is attached hereto as **Exhibit 18.**

This cited change in general plan, without any implementing zoning change, does not support the City's thesis that an (O-A) general plan overlay was effective to either prohibit residential uses, much a less duly adopted land use control without serious notice, vagueness, and other bars to enforceability.

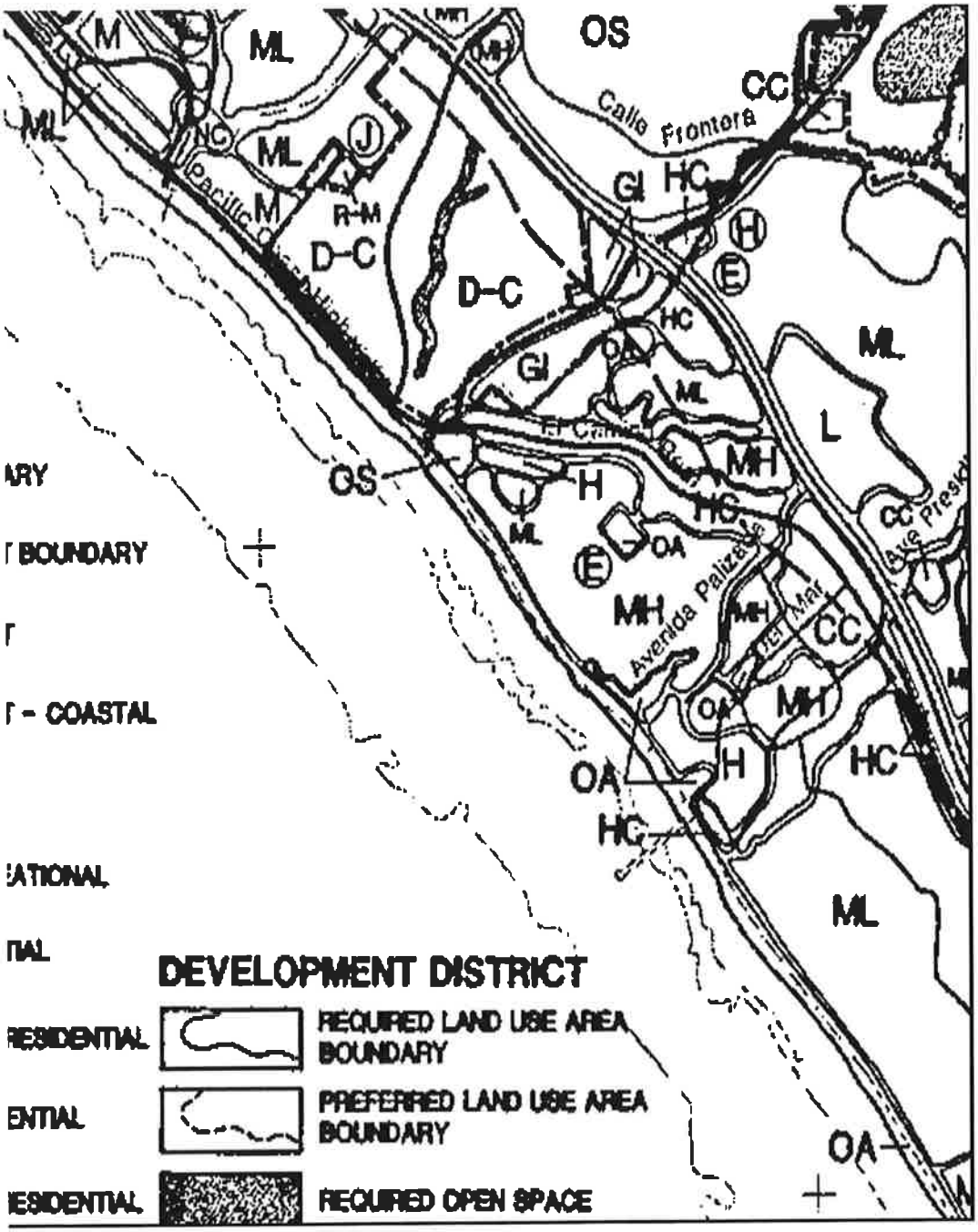
In fact there is no allegation that the general plan overlay in any way adversely affected the S-1 zone; to the contrary, the City's own report impeaches any clarity or precedential effect from this control, with the following statement:

> 4. As stated by City staff, a major deficiency in the existing zoning ordinance is specific districts which "contain confusing terminology, ambiguities...." Perhaps the best example of confusion is contained in the O-A Open Area Recreational District permitted uses. "Any structure or use or removal of any vegetation or natural materials that might tend to defeat the purpose of this district."

In this memorandum, the City is acknowledging that the O-A district is cumbersome, ambiguous, confusing, and *expressly authorizes residential uses.* In fact, the City Planning Department admits so in a memorandum dated September 22, 1981:

> uses contained in the Government Code. In consultation with our local representative from the Office of Planning and Research, I requested they examine the Open Space Ordinance within the context of the requirements for open space plans and zoning consistency contained in the Government Code. That agency's conclusion was that should a legal challenge be offered to the sufficiency of the Open Space Element of our General Plan and zoning consistency through the Open Space Zoning District, they could not support its compliance or internal consistency requirement. This could be potentially damaging should someone challenge our Ordinance and request an interpretation of the guidelines from the official planning advisory body of the State. Our representative stated they doubt that the Attorney General's Office would find our Ordinance consistent with the intent of the Government Code and our own General Plan designation.
>
> Another deficiency in the Open Space Ordinance, which is contained within a provision of Paragraph 26 and allows dwelling densities from single family through multiple family, is that it states that all residential development shall conform

Again, assuming for purposes of argument that Capistrano Shores was adequately, legibly documented on the General Plan Map as "O-A," this was without import or affect given the permissibility of residential uses in "O-A." However, we reject that Capistrano Shores is adequately mapped as "O-A" in 1982. The enlarged portion below shows no land use designation relating to Capistrano Shores, and is insufficient to put the owners on notice of a change in designation.



Further, the general plan change and implementing zone change from S-1, occurred in 1995 and 1996 respectively, as we previously communicated in our earlier correspondence to the City. *See* Exhibit 6, 1993 Memorandum from Kelly Main, Associate Planner, dated December 9, 1993.

SECTION 9
THE DENIAL AND CITY ATTORNEY'S LETTER INCORRECTLY STATES THAT THE 1986 ORD. 926 AMENDMENT TO ORD. 794 APPLIED TO CAPISTRANO SHORES AND RE-ZONED CAPO SHORES.

According to Mr. Goldfarb's November 19, 2013 letter, the zoning relating to the Park has progressed as follows: first, the "land use designation on the property permitted mobile home parks with a 'use variance.'" In 1982, Mr. Goldfarb continues, the property changed to Open-Area Recreational. Finally, Mr. Goldfarb purports that since 1986, the property has been designated as S-1, which "prohibits all residential uses, rendering the Park and its existing mobile homes to be legal non-conforming uses."

Mr. Goldfarb has misstated the zoning history of the Park, as well as the uses permitted by the various designations. The Park was zoned S-1, Shoreline District, from 1962 to 1996. Contrary to Mr. Goldfarb's assessment, S-1 does not prohibit all residential uses. Rather, S-1's only restriction on development is a height limit of twenty-five (25) feet. (**Exhibit 6**- ZOAC 9-Part A).

Further, Ordinance 792 created an open space overlay, which expressly permitted mobilehome parks pursuant to a permit, the same type of permit which created Capistrano Shores Mobilehome Park (***See* Exhibit 5**). Additionally, Ordinance 792, as was discussed previously, failed to effectively create any enforceable overlay to prohibit residential development, as stated in Section 8--the City acknowledged in a memorandum dated September 22, 1981 that the O-A district is cumbersome, ambiguous, confusing, and *expressly authorizes residential uses.*

The 1986 General Plan did not re-designate the Park as "open space". Similarly, City Council Ordinance 926 (**Exhibit 19**), issued in response to the 1986 General Plan, *did not affect that Park, as that Ordinance only applies to the Senior Citizens Housing Overlay District.*

SECTION 10
THE 1996 ATTEMPTED RE-ZONE OF THE PARK TO OPEN SPACE WITHOUT NOTICE TO THE THEN PARK OWNERS IS VOID. THE LACK OF NOTICE WAS INTENTIONAL AND A METHOD TO CLOSE THE PARK OVER TIME.

First, we disagree with the City Attorney's assumption that the notice provided in the 1996 re-zone, and the actions up to the re-zone, were adequate, and not misleading. Furthermore, citation of Cal. Gov. Code § 65093 is not dispositive of the issue.

The issue of sufficiency of notice, leading up to the 1993 General Plan, has been brought before the Orange County Superior Court in *Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256 (2011). **A court has already found the notice published in the Sun Post, or posted at San Clemente City Hall, to be insufficient to afford property owners of the prospective downzoning of their property.** As this issue was actually litigated in the *Avenida San Juan Partnership* case, the court confirmed that no "draft general plan map had ever been published" prior to the adoption of the 1993 General Plan, and the lack of a published draft general plan map was been found to be a due process violation, notwithstanding Cal. Gov. Code § 65093. For your convenience, the text of the *Avenida San Juan Partnership* decision, as well as the administrative record in digital form, are attached hereto as **Exhibit 21.**

As to the notice by publication, we believe it was so defective, so as to fail to put Capistrano Shores owners on notice. To wit: the posted notice was as follows:

Open Space

> **Coastal Trailer Park - Retain 1982 General Plan concept of Public Open Space/Shoreline for trailer park located on ocean side of Pacific Coast Highway in North Beach.**

This notice is facially invalid for several reasons in addition to illegible print in the Sun-Post Newspaper copy; most notably, "Capistrano Shores" was the name of the park as referenced *in the General Plan*—it was not referred to as "Coastal Trailer Park" nor was it called "Public Open Space." The park was privately owned, and was improved with the mobile home park and mobilehomes that are present today. ***See* Exhibit 20, Notice.**

The Owners of Capistrano Shores were not given notice as required by due process protections under the California and United States constitutions, and under Cal. Gov. Code §§ 65091(a)(1), 65353(b), and 65853. *See Sounhein v. City of San Dimas*, 11 Cal. App. 4th 1255 (1992). **Exhibit 23.**

Even assuming direct notice or notice by publication, mere notice that a general plan is being considered is not sufficient to down zone property. Cal. Gov. Code § 65353 requires notice pursuant to Cal. Gov. Code § 65091(a)(1) and (3) when "a proposed general plan…would affect the permitted uses or intensity of uses of real property." Cal. Gov. Code § 65353(b). In fact, misleading notice which fails to inform parties that they will lose a property as a result perspective changes to the land-use controls, poses a due process concerns and makes that

proposed land-use control voidable. *See, e.g. Avenida San Juan Partnership,* 201 Cal. App. 4th 1256.

Secondly, while we appreciate the City of San Clemente removed language from the general plan which stated an intent to acquire the Capistrano Shores mobile home park by any means possible, including eminent domain, *we remain concerned that the language was included in the general plan at all.* When read together with the downzoning of Capistrano Shores Mobilehome Park from S-1 to OS 2, we believe the city's intent to unfairly spot zone Capistrano Shores is established.

Previous Acts Singling Out Capistrano Shores
The only mention of coastal access, in the General Plan adopted July 21, 1983, appears to be the excerpt below:

Coastal Access. Because nearly all areas of the City near the coast are fully developed, improvement of coastal access and provision of additional parking is difficult. In order to improve coastal access, the following policy is adopted:

Coastal Access Policies

P3.18 The City will continue to study the potential to improve coastal access through provision of adequate beach parking and/or inland parking with beach transportation.

As is evident, this excerpt does not discuss coastal access management programs seeking an exaction (along the line of Cal. Pub. Res. Code § 30610.3), nor does it reconcile how a mobile home park would be singled out for regulation intended to exact from "subdivision[s]". Cal. Pub. Res. Code § 30610.3. Capistrano Shores is not "an existing subdivided area which has less than 75 percent of the subdivided lots built upon, or an area proposed to be subdivided." Cal. Pub. Res. Code § 30610.3.[1]

As coastal access management programs were first included in chaptered legislation in the 1979 session, and as they were not present in the 1982 General Plan, we expect the "access management program" language targeting Capistrano Shores was not adopted until the City language calling out "Capistrano Shores" which stood as a veritable "resolution of necessity":

[1] Cal. Pub. Res. Code § 30610.3 reads in relevant part: " Whenever the commission determines (1) that public access opportunities through an existing subdivided area, which has less than 75 percent of the subdivided lots built upon, or an area proposed to be subdivided are not adequate to meet the public access requirements of this division and (2) that individual owners of vacant lots in those areas do not have the legal authority to comply with public access requirements as a condition of securing a coastal development permit for the reason that some other person or persons has legal authority, the commission shall implement public access requirements as provided in this section."

2. Strictly enforce the City's municipal code regarding non conforming land uses on the existing, non conforming Capistrano Shores Mobile Home Park. Investigate alternatives and feasibility for acquiring said land for public ownership.

City of San Clemente General Plan, "Implementation Measures: Shoreline," Page 4-12 (adopted 1993).

Additionally, it is unclear whether the City attempted to assuage Capistrano Shores resident concerns with the statement: "[f]or instance, in situations where requiring public access would result in a "taking" under either the U.S. or California Constitutions, no access will be required." This is boilerplate language required by the Coastal Act, Cal. Pub. Res. Code § 30010, which prohibits a local jurisdiction from effecting a regulatory "taking" in following the Coastal Act; the Coastal Commission lacks such "taking" power as well.

However, Cal. Pub. Res. Code § 30010 has little bearing on whether the City would exact unreasonable fees on permits, under the guise of a Cal. Pub. Res. Code § 30610.3 "access management program." What comfort is it to a private property owner, that the City could burden property as far as possible without paying just compensation?

Our concern remains that Capistrano Shores has been "singled out" in a nonsensical way, in a policy that brandishes an exaction. An access management program policy should be wholly inapplicable to a completed mobilehome park, as interior is regulated by the MPA.

Furthermore, an access exaction would be impractical, unnecessary, and unsafe, regardless of any improvements: the length of Capistrano Shores abuts an active railroad line, which abuts a busy street with concrete dividers and no foot traffic, which abuts a massive bluff face. As the City is aware, Capistrano Shores is bordered to the South by a large public parking lot and trail with direct access to the beach. Given the convergence of these factors; the availability of public access in the area, the fact that coastal management access programs are intended for vacant, subdivided land, and the narrow transportation corridor next to the natural barrier of a bluff, it seems an abuse of discretion to adopt a General Plan threatening this exaction, in the face of a record wholly devoid of factual support for the threat.

Furthermore, we submit that any exaction for access would be preempted by HCD as to any implementation, and would constitute a taking as it would evict a resident given Title 25 setback and lot size requirements.

When read together with a) the City's onerous language singling out "*Capistrano Shores mobilehome park*" for acquisition by eminent domain, b) the City's onerous language singling out "*Capistrano Shores mobilehome park*" for "strict enforcement" of City ordinances, and c) the City's onerous language singling out "*Capistrano Shores mobilehome park*" for a "coastal access management program" which is expressly limited by statute to vacant subdivisions, the City's "omissions or errors" of 1) omitting use of *"Capistrano Shores mobilehome park"* in the

recorded and published notice for the purported changes in General Plan and zoning, 2) omitting mailed or delivered notice to the owners of the Park, and 3) omitting a plan map as established in *Avenida San Juan Partnership*, we venture these omissions seem far more willful than "erroneous", and find the use of these City regulations to deny permits unconscionable. There are also several occasions of handwritten notes, showing an internal City intention of closing he Park. *See* **Exhibit 22.**

SECTION 11
THE DENIAL DEMONSTRATES THE INTENT OF THE CITY OF SAN CLEMENTE TO TAKE THE PARK OWNED BY CAPISTRANO SHORES, INC., WHICH IS COMPRISED OF THE OWNERS OF THE MOBILEHOMES. THE GOLDFARB LETTER FURTHER CONFIRMS THE LONG RANGE PLANNING OF THE CITY TO DIVEST THE RESIDENTS OF THEIR PARK AND THEIR HOMES.

In his letter dated November 19, 2013, the City Attorney, Mr. Goldfarb, states that the zoning classification applicable to the Park (open space) is to be enforced "as speedily as is consistent with proper safeguards for the interests of those affected." (**Exhibit** 3). The City has been targeting the Park for closure for quite some time, as further evidenced by their plans to "redevelop [the] existing trailer park for coastal-related recreational uses." (**Exhibit 2,** AR002021, AR003241)

The City has been targeting the Park for closure for quite some time, as further evidenced by their plans to "redevelop [the] existing trailer park for coastal-related recreational uses."

The US and California Constitutions both prohibit the taking of private property without just compensation. (*U.S. Const. amend. V* and *Cal. Const. Art. I § 19*). It is well established that "when the owner of real property has been called upon to sacrifice all economically beneficial uses [of his land] in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1019. **Exhibit 24.** The *Lucas* Court, acknowledging the required balance between public and private interests in land, stated that:

> On the [private] side of the balance, affirmatively supporting a compensation requirement, is the fact that *regulations that leave the owner of land without economically beneficial or productive options for its use- typically, as here, by requiring land to be left substantially in its natural state- carry with them a heightened risk that private property is being pressed into some form of a public service under the guise of mitigating public harm...* The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. *Id.* at 1018-9 (internal citations omitted, emphasis added).

Citing the zoning ordinance and protecting views from a planned public park to be built, the City has refused to issue permits relating to the mobilehomes within the Park for several years. Accordingly, Park residents are unable to perform required maintenance or improvement projects. This will inevitably lead to deterioration of the mobilehomes and Park infrastructure to the point that the Park itself will be forced to close.

The Park residents have invested vast amounts of money and effort into the maintenance and improvement of the mobilehomes and the Park itself over the past 50 years. The countervailing public interest has yet to be actualized; the Marblehead Coast Park is still in development. Should the City continue its refusal to award permits, all ninety (90) residents of the Park will suffer the exact type of taking that the *Lucas* ruling was designed to prevent, all in the name of preserving potential views.

These acts also constitute a planned closure of Capistrano Shores Mobilehome Park over time through the City zoning and related ordinance and statutes to perform mandated ministerial acts. A park closure cannot be implemented one space at a time. The City is obligated by reason of the "taking" and the intended park closure to reimburse the Park residents and owners for their property or to comply with the statutory and common law applicable to local jurisdictions, including the City of San Clemente.

SECTION 12
VOTER APPROVAL IS NOT REQUIRED TO CORRECT THE ZONING

In January, 2013 the City Council removed an open space zone on the Shorecliffs Mobilehome Park and reinstated the prior zone on the basis of error in the General Plan. The Appellants are hereby requesting the City take the same action with regard to Capistrano Shores Mobilehome Park. Various City staff has verbally declined to consider or support this action for Capistrano Shores Mobilehome Park because it occupies a linear landmass of one (1) mile or more. This statement is factually incorrect. The length of the Park is .679 of one (1) mile. **Exhibit 25,** Grant Deed.

Further, the current 1993 General Plan provides two (2) further exceptions to the requirement that voters approve rezoning, which are (i) that a taking would occur as a result of the zoning actions and (ii) that state and/or federal pre-emption controls. See, footnote 5 to the December 13, 2013 correspondence to the City Attorney and **Exhibit 26** the full text of I 1.26(A)(1) and (2) from the City's current GP.

CSI had hoped to work through the General Plan and Coastal committees for the City of San Clemente and the hearings related to those topics at the Planning Commission and City Council. Unfortunately, these efforts to resolve the issues have been unsuccessful. If the City's position on zoning and the non-conforming use ordinance continues, CSI may be forced to seek an amendment to the General Plan and to have the Property rezoned.

SECTION 13
REQUESTED ACTION

Based on the foregoing, CSI and the owners of the mobilehome located on Space 22 respectfully request the City take the following actions in response to this Appeal:

1. Approve the installation of a replacement mobilehome for Space 22;

2. Acknowledge and agree that the City's zoning ordinances do not supersede the state Manufactured Housing Act, the state Mobilehome Park Act and the federal act known as the National Manufactured Housing Construction and Safety Standards Act of 1974;

3. Acknowledge and agree that the City must comply with the applicable state and federal statutes, and related regulations for each, in fulfilling its duties acting as the enforcement agency for HCD, or relinquish the enforcement duties back to HCD; and,

4. Correct the General Plan and zoning error that occurred in 1993 and 1996 respectively to remove the inapplicable open space designation, and restore the Capistrano Shores Mobilehome Park to a zone compatible with its use since 1959.

Exhibit 1

Exhibit 1: List of Previous Correspondence Incorporated By Reference

TO	FROM	DATE	REGARDING
Jeffrey M. Oderman, City Attorney	L. Sue Loftin, The Loftin Firm	April 23, 2007	Regulation of Capistrano Shores Mobilehome Park (the "**Park**")
George Scarborough, City Manager	L. Sue Loftin, The Loftin Firm	May 27, 2008	Proposed Procedure for Approval of Replacement Homes Consistent with State Statutes
Jeffrey M, Oderman, City Attorney	L. Sue Loftin, The Loftin Firm	May 28, 2008	Regulations Pertaining to the Park
L. Sue Loftin, The Loftin Firm	Jeffrey M. Oderman, City Attorney	July 22, 2008	Regulations Pertaining to the Park
George Scarborough	L. Sue Loftin, The Loftin Firm	August 6, 2008	Application to Approve New Manufactured Home (Space #46)
John Ciampa, City of San Clemente	L. Sue Loftin, The Loftin Firm	November 21, 2011	Fence for Spaces 40 and 57
John Ciampa, City of San Clemente	L. Sue Loftin, The Loftin Firm	February 23, 2012	Continued Correspondence Regarding Fences
L. Sue Loftin, The Loftin Firm	James Holloway, San Clemente Community Development Director	March 13, 2013	Fence for Spaces 40 and 50
City of San Clemente Planning Commission	L. Sue Loftin, The Loftin Firm	December 10, 2012	Proposed General Plan Amendment
L. Sue Loftin, The Loftin Firm	James Holloway, San Clemente Community Development Director	February 4, 2013	City Centennial General Plan
City of San Clemente Planning Commission and James Holloway	L. Sue Loftin, The Loftin Firm	April 3, 2013	Changes to General Plan Regarding Zoning Relating to the Park
City of San Clemente Planning Commission and James Holloway	L. Sue Loftin, The Loftin Firm	May 29, 2013	Request to Correct the General Plan Designation and Implementing Zoning
Adam Atamian, San Clemente Assistant Planner	L. Sue Loftin, The Loftin Firm	May 30, 2013	In –Concept Review Denial Contrary to California Housing and Community Development, Dennis L. Beddard Memorandum dated March 26, 2009
City of San Clemente Planning Division and	L. Sue Loftin, The Loftin Firm	June 11, 2013	Agenda Item: 8-A San Clemente Planning commission: June 11, 2013

Exhibit 1: List of Previous Correspondence Incorporated By Reference

Planning Commission			
City of San Clemente Planning Commission	Alexander Maniscalco, The Loftin Firm	July 24, 2013	Resubmission of Previous Correspondence
Alexander Maniscalco, The Loftin Firm	Jeffrey A. Goldfarb, City Attorney	August 19, 2013	City Centennial General Plan and Capistrano Shores Mobile Home Park
City of San Clemente Planning Commission	Alexander Maniscalco, The Loftin Firm	September 4, 2013	September 4, 2013 Commission Meeting- Agenda Item 8-F: Zoning Amendment 13-313
Jeffrey A. Goldfarb, City Attorney, Honorable Mayor, and City Council Members	L. Sue Loftin, The Loftin Firm	September 24, 2013	September 24, 2013 City Council Meeting
Jeffrey A. Goldfarb, City Attorney, Honorable Mayor, and City Council Members	Alexander Maniscalco, The Loftin Firm	October 1, 2013	October 1, 2013 City Council Meeting: Item 7(B): General Plan
Alexander Maniscalco, The Loftin Firm	Jeffrey A. Goldfarb, City Attorney	October 4, 2013	Capistrano Shore Mobile Home Park, October 1, 2013 Letter
Eric Anderson, Capistrano Shores Park Manager	Sean Nichols, San Clemente Associate Planner	December 10, 2013	Memorandum, Planning with Memorandum of Denial (Letter from Jeffrey A. Goldfarb, City Attorney, to California Coastal Commission)
Jeffrey A. Goldfarb, City Attorney	L. Sue Loftin, The Loftin Firm	December 13, 2013	Response to Memorandum of Denial

Exhibit 2

City of San Clemente
Community Development

Michael Jorgensen, Building Official
Phone: (949) 361-6170 Fax: (949) 361-8281
jorgensenm@san-clemente.org

September 22, 2014

Mr. Eric Anderson
Park Manager
1880 N. El Camino Real
San Clemente, CA 92672

Subject: **City Plan Review (1st Review)**
Permit Application B14- 1374
Application to Replace an Existing 900 square foot Mobilehome with a New 1,248 square foot Mobilehome within the Capistrano Shores Mobilehome Park Located at 1880 N. El Camino Real – Space #22

Dear Eric:

This information is being provided to you because you have been identified as the point of contact on the permit application. The Building and Planning Divisions have completed their fist review.

As you may be aware, Sean Nicholas, Associate Planner is out of the office due to an unfortunate death in his family. In order to avoid any further delay with the review of your project I am forwarding Planning comments in this letter.

Building Division Comments
The Building Division has reviewed the proposed improvements for compliance with Title 25, Chapter 2 Mobilehome Parks and Installations and corrections dated August 26, 2014 are attached.

Planning Division Comments

1. Please identify the space number on the site plan.

2. The proposed replacement of the existing 900 square foot mobilehome with a new 1,248 square foot mobilehome does not comply with San Clemente Municipal Code Section 17.72.060 Nonconforming Use restrictions.

The proposed replacement mobilehome constitutes a 348 square foot (39%) increase in the square footage of the existing mobilehome, which is a nonconforming use. The current zoning code does not allow the expansion of nonconforming uses.

Please make the necessary changes to your project prior to resubmitting and provide a written respond to each correction when resubmitting your project. Responses should include how the correction was resolved and where information has been shown when resubmitting.

Sincerely,

Michael Jorgensen, PE, CBO
Building Official

Cc: Erik Sund, Acting City Manager
Jim Holloway, Community Development Director
Sean Nicholas, Associate Planner
Jeff Oderman, City Attorney
Peter Howell, Rutan & Tucker

p:\mike docs\plan checks\capo shores -space 22 - 1st review.docx

CITY OF SAN CLEMENTE
BUILDING DIVISION
Plan Review Correction List
Single Family Residence/Duplex/Garage

City ☐
Applicant ☐

APPLIES TO PROJECTS SUBMITTED ON OR AFTER JANUARY 1, 2014

CONTACT INFORMATION:

Project Address:	**1880 N. El Camino Real #22**	Plan Check #:	B14-1374-1st PC
Owner:	**Wills Revocable Living Trust**	Phone:	714-473-3058
Architect / Designer:		Phone:	
Engineer:		Phone:	

PROJECT INFORMATION:

Use of Building:	SFR	Occupancy:	R3
Type of Construction:	VB - sprinkled	Area:	1248 s.f.
Estimated Construction Valuation:	$		

GENERAL INFORMATION

- Make all corrections listed below
- Resubmit revised/corrected plans
- Submit a response list that indicates how each correction was resolved
- The plans examiner is available for conferences and telephone calls Monday through Friday between the hours of 8 a.m. to 12:30 p.m. and 1:30 p.m. to 5 p.m. Appointments are recommended.

Corrections below are to be made on plans before permit is issued. The approval of plans and specifications does not permit the violation of any section of the Building Code or other City Ordinance or State Law. The following list does not necessarily include all errors and omissions. See Chapter 1, Division II, Section R105.4 of the latest California Residential Code. **Return this correction sheet with original and corrected plans with a response to each correction.**

2013 CALIFORNIA CODES (applicable to all projects applied for on or after January 1, 2014):

California Residential Code (CRC) *based on the 2012 edition of the International Residential Code (IRC)*
California Building Code (CBC) *based on the 2012 edition of the International Building Code (IBC)*
California Plumbing Code (CPC) *based on the 2012 Uniform Plumbing Code (UPC)*
California Mechanical Code (CMC) *based on the 2012 Uniform Mechanical Code (UMC)*
California Electrical Code (CEC) *based on the 2011 National Electrical Code (NEC)*
California Energy Code *2013 Edition*
California Green Building Standards Code *2013 Edition*

Plan Review Clearance required from:

☐ Planning Division
☐ Engineering Division
☐ Orange County Fire Authority (OCFA)
☐ Other: HOA

Respond to each of the following comments in writing with response to each item number that outlines how each correction has been resolved and where it may be found on the plans.

Incorporate (IMPRINT) the following missing information ON THE PLANS:

☑ **2013 CALGreen Code Residential Mandatory Measures Checklist.**

PLAN REVIEW CORRECTIONS:

1. Show location of equipment to supply power within four feet of the proposed location of the unit. Title 25, Chapter 2, Section 1184

2. Show location of gas riser outlet terminating within four feet of the proposed location of the unit. Title 25, Chapter 2, Section 1222

3. Show location of water outlet within four feet of the proposed location of the unit. Title 25, Chapter 25, Section 1274(B)

4. Submittal does not indicate any accessory structures, i.e. steps, landing, porches, carports, etc. Any item mentioned would require separate plans and permits which have not been provided at this time.

5. Where the mobile home swings inward or is a sliding door, the landing, porch or top step of the stairway may not be more than 7-1/2 inches below the door. The width of the landing, porch or top step of the stairway shall comply both with subsection (a) of this section and not be less than the width of the door opening. Title 25, Chapter 2, Section 1498(d)

6. At the time of the mobile home unit installation inspection, all existing doorways of an mobile home unit shall be provided with a porch, ramp and/or stairway. Title 25, Chapter 2, Section 1368. Show compliance on plans.

❑ **Corrected plans are to be logged in for recheck.**

Thank you in advance for your cooperation!

Robert Hernandez	**(949) 361-6167**
PLAN CHECK STAFF	PHONE
	(949) 361-
PLAN CHECK STAFF	PHONE

1st Review Date:	08/26/2014	By:	Robert Hernandez
2nd Review Date:		By:	
3rd Review Date:		By:	
Approved By:		By:	

(See attached ___ sheets of additional information)

RUTAN

Jeffrey A. Goldfarb
Direct Dial: (714) 641-3488
E-mail: jgoldfarb@rutan.com

November 19, 2013

Mr. Charles Lester
Executive Directer
California Coastal Commission
45 Freemont street
San Francisco, CA 94105-2219

Re: Building Permit Application --1880 N. El Camino Real (Space #23)--
Local Agency Review

Dear Director Lester:

The City of San Clemente (the "City") has received an application to alter the foundation of the existing mobile home at 1880 N. El Camino Real (Space #23) in order to support a significant remodel including the addition of a second story to the existing one-story mobile home (the "Project"). The remodel and second story addition to the existing mobile home, though permitted by the California Department of Housing and Community Development ("HCD"), has been accomplished without first obtaining the necessary foundation permit from the City or the requisite Coastal Development Permit. There are now no less than 13 such unpermitted second story additions between the ocean and the first public road in the Capistrano Shores Mobile Home Park (the "Park")

The Project is within the Park which, in turn, is located within the City of San Clemente. Pursuant to Coastal Commission requirements, the City is providing the attached Local Agency Review for the Project. As explained below, ambiguities in the law make it unclear whether the City has the legal authority to approve the Project. These ambiguities notwithstanding, the City opposes the issuance of a Coastal Development Permit as the City believes the Project will negatively and significantly impact the public's views of the beach and ocean from the new Marblehead public park and coastal trails.

A. The Project, if Developed, Would Violate the City's Zoning Ordinance, but May Be Consistent with the Mobile Home Parks Act.

The City and HCD disagree over whether the City's zoning ordinance prohibits significant additions to mobile homes within the Park. The Mobile Home Parks Act ("MHPA") (Health & Safety Code § 18200 *et seq.*) and Title 25 of the California Code of Regulations regulate the development and operation of mobile home parks in the State of California. The MHPA and the regulations promulgated by HCD "supersede any ordinance enacted by any city."

(Health & Safety Code § 18300.) Section 18300 sub. (g), however, goes on to provide that the MHPA does *not* prevent the City from "establishing . . . certain zones for manufactured homes, mobile homes, and mobile home parks within the city. . . ." Both the City and HCD agree that this includes the authority of the City to rezone the land on which a mobile home park sits in a manner which subsequently prohibits mobile home parks.

The Park was initiated in 1959 when the land use designation on the property permitted mobile home parks with a "use variance." In 1982, however, the General Plan designation on the property was Open Area-Recreational ("O-A"). In 1986, the "S-1" zoning on the property was amended to prohibit all residential uses, rendering the Park and its existing mobile homes to be legal non-conforming uses. San Clemente Municipal Code section 17.72.060 regulates the expansion of non-conforming uses. Specifically, section 17.72.060(D) provides "a non-conforming use shall not be expanded if the use is prohibited." (Section 17.72.060(D)(2).) "Expansion" includes the "construction of a new structure or an increase in the gross square footage of an existing structure to increase the floor space that is occupied by a non-conforming use." (Section 17.72.060(D)(2)(a).)

The City believes that Section 17.72.060(D)(2) prohibits the expansion of mobile homes in the Park. Such expansions would include the addition of a second story on an existing structure.

HCD takes a different position. HCD and the City agree that under Health and Safety Code Section 18300 the City has the power to zone property for mobile home parks and the power to change that zoning to prohibit mobile home parks. That is where the City and HCD part company. Although the City has the power to make the Park a non-conforming use, HCD believes that the power to zone or un-zone land for a mobile home park does not encompass the power to determine the spatial arrangements within the Park or the nature of the structures located in the Park. Thus, HCD believes that once a mobile home park has been established, even if the underlying land is later rezoned (thus making the Park a legal non-conforming use), the Park remains subject to the preemptive jurisdiction of the MPA and the MHA. As such, HCD believes that the City's legal non-conforming use provisions are inapplicable to the Park. Therefore, because second stories are permitted under the MPHA and Title 25, it would be HCD's position that the City must issue the necessary permits for the second story foundation.

The City believes HCD is wrong. The courts of this state have repeatedly stated that the purpose of zoning is to ensure that the zoned areas of the City contain only that class of development permitted by the zoning regulations. "The ultimate purpose of zoning is to confine certain classes of buildings and uses to particular localities ***and to reduce all non-conforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected.*** Any change in the premises which tends to give permanency to or expands the non-conforming use would not be consistent with this purpose." (*Paramount Rock*

Co., Inc. v. County of San Diego (1960) 180 Cal.App.2d 217, 228-29.) In the absence of the ability to enforce its non-conforming use regulations, the zoning classification becomes meaningless because the City cannot "reduce all non-conforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected."

The above disagreement between the City and HCD renders the City unable to determine whether it legally may issue an in-concept approval for the proposed project. The City believes that its Zoning Ordinance prevents the City from issuing such an approval because the project results in an expansion of a legal non-conforming use in violation of Section 17.72.060(D)(2). HCD believes, the legal non-conforming status of the Park notwithstanding, the City is preempted from applying section 17.72.060(D)(2).

Based on the foregoing, the City submits the above information to the Commission with a request that the Commission make a determination not based on local land use regulations, but on whether the Commission believes the proposed project complies with the Coastal Act. As explained below, the City believes it does not.

B. The City Objects to the Issuance of a Coastal Development Permit for the Project Because the Project will Impair Beach, Whitewater and Blue Water Views from Marblehead Park and the Coastal Trails.

The Coastal Commission certified the City's Coastal Land Use Plan on March 14, 1996. That plan has been incorporated into the City's General Plan as the "Coastal Element." Goal XII of the Coastal Element compels the City to maintain the "visual quality, aesthetic qualities and scenic public views in the coastal zone." Policy XII.5 implements the aforementioned goal by requiring the preservation of the "aesthetic resources of the City, including . . . significant public views." Similarly, Policy XII.9 requires the "preservation of significant public view corridors to the ocean."

Marblehead Coastal Park and the significant coastal trail network that traverses the Marblehead bluff is being developed. The views from both the Coastal Park and the coastal trails to the ocean are significant public views. The City believes the approval of the Project will violate the approved Coastal Land Use Plan because the addition of a second story will significantly intrude in the view corridor from the Coastal Park and trails to beach and ocean views. The City has taken pictures from what will be public areas in the Marblehead Coastal Park and Trails of the Park once park and trail construction is completed. As can be seen from the picture attached as Exhibit "A," Unit No. 23's unpermitted second story addition substantially intrudes into the ocean and whitewater views.

While the City believes the addition of a single second story unit alone is significant, the City is mindful of the fact that there are currently at least 13 second stories which have been

installed without the benefit of a Coastal Development Permit. Thus, the City wishes to make the Commission aware of the cumulative impact these second stories will have. As can be seen from the pictures attached as Exhibit "B," these second stories are greatly blocking the public whitewater views from the Marblehead Coastal Park and trails. Such expansions are increasing at an alarming pace. The cumulative effect of the second story additions in the Park on views from the Marblehead Coastal Park and trails is simply unacceptable.

Finally, it cannot be overlooked that the unpermitted addition of second stories has now been going on for at least three (3) years. There are now 13 such unpermitted second story additions. The second story additions block whitewater views (see attached Exhibit "B") from the coastal trails and coastal parks that the California Coastal Commission fought so hard to establish on the Marblehead Coastal properties. The City is extremely concerned that the ongoing reluctance of the Coastal Commission to enforce the California Coastal Act will not only make this issue increasingly difficult to resolve, but it will serve as a catalyst to additional unpermitted second story development.

For the foregoing reasons, the City believes the issuance of a Coastal Development Permit violates the City's Coastal Land Use Plan and requests the Commission deny the application for a Coastal Development Permit.

Respectfully submitted,

RUTAN & TUCKER, LLP

Jeffrey A. Goldfarb
City Attorney, City of San Clemente

JAG:jh
Attachments

cc: Sherilyn Sarb, Deputy Director
Teresa Henry, District Manager
Mayor and Members of the City Council
Pall Gudgeirsson, City Manager
Eric Sund, Assistant City Manager
James S. Holloway, Community Development Director
Mike Jorgensen, Building Official
Jim Pechous, City Planner

EXHIBIT "A"

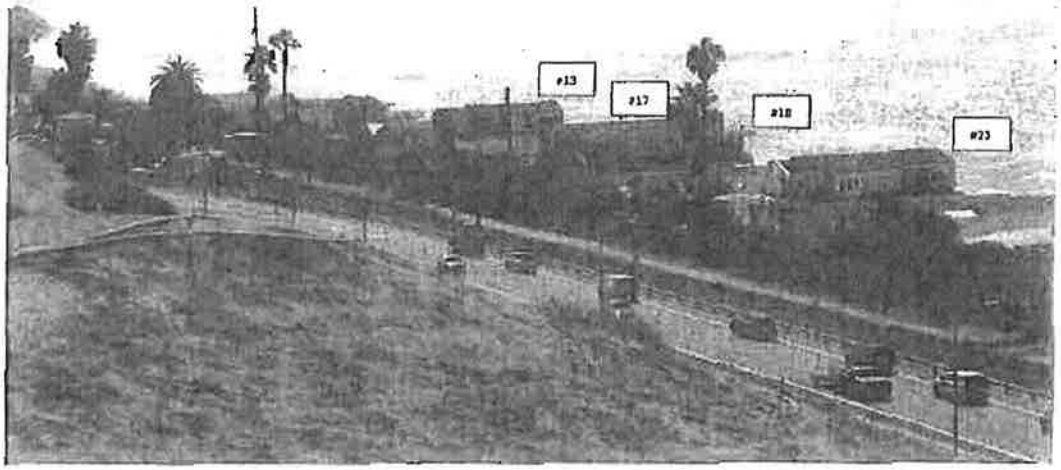

#13
#17
#18
#23

EXHIBIT "B"

2nd story (space #17) viewed from N. El Camino Real

2nd story (space #13) viewed from N. El Camino Real

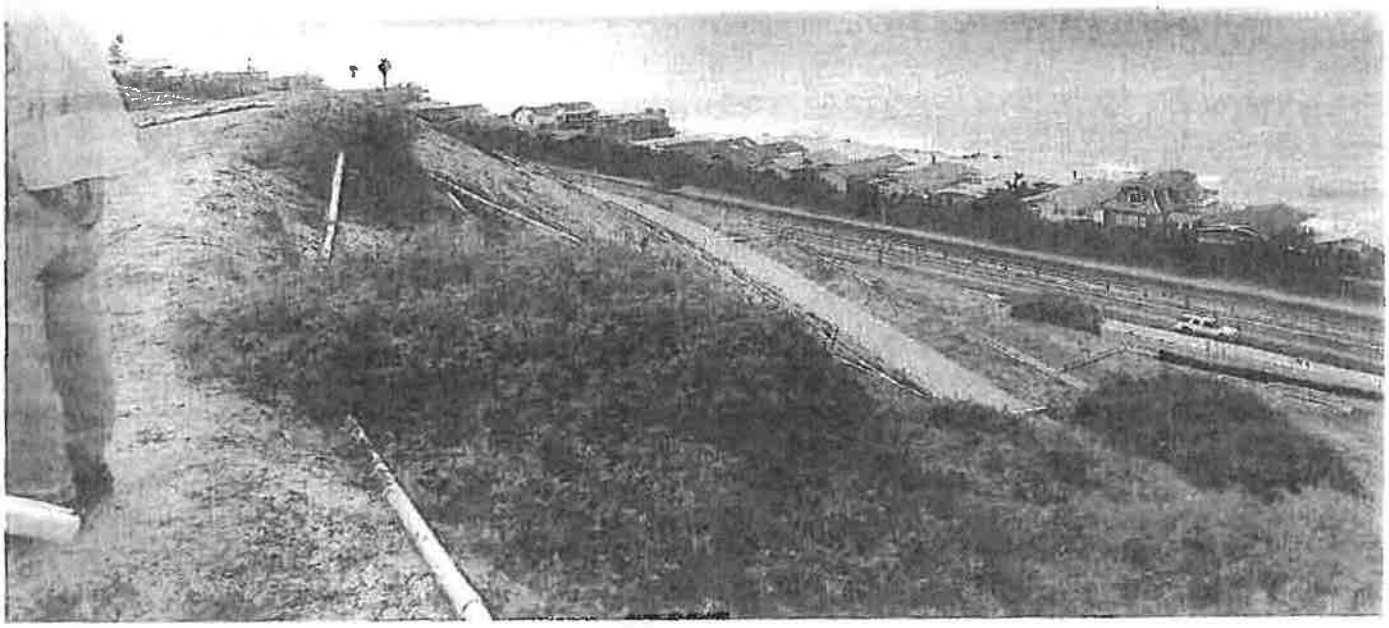


Exhibit 3

CONSENT AND ASSIGNMENT AGREEMENT

This CONSENT AND ASSIGNMENT AGREEMENT ("**Agreement**") is made and entered into this 25 day of September, 2014 ("**Effective Date**") by and between Eric Wills, Trustee of the Wills Recovable Living Trust dated 11/23/99 (the "**Assignor**") and Capistrano Shores, Inc., a California nonprofit-mutual benefit corporation ("**CSI**") with reference to the following:

RECITALS

A. The Assignor owns that certain membership share associated with Lot 22 in the Capistrano Shores community located at 1880 N. El Camino Real, San Clemente, California ("**Lot 22**") and occupy Lot 22 upon which is placed a manufactured home and all appurtenant structures related thereto.

B. CSI owns Capistrano Shores Mobilehome Park, a manufactured housing community located at 1880 N. El Camino Real, San Clemente, California (the "Park").

C. The Assignor submitted a Permit Application to the City of San Clemente Planning Department seeking approval to update the manufactured home's foundation system, which application was responded to by the City of San Clemente Planning Department, via City Plan Review to Permit Application B14-1374, with the comment: "The proposed replacement of the existing 900 square foot mobilehome with a new 1,248 square foot mobilehome does not comply with San Clemente Municipal Code Section 17.72.060 Nonconforming Use restrictions. The proposed replacement mobilehome constitutes a 348 square foot (39%) increase in the square footage of the existing mobilehome, which is a nonconforming use. The current zoning code does not allow the expansion of nonconforming uses."

D. The denial of the Lot 22 Permit Application was effectuated by and through the Planning Department comment above, which continues a position reflected in the November 19, 2013 letter from the City Attorney to the Director of the Coastal Commission requesting the Coastal Commission issue no permits for Capistrano Shores because the purported "zoning" did not allow such work to be done in the Park.

E. The denial of the Lot 22 Permit Application affects the property values of all homes located within the Park, as well as the value of the Park itself, and threatens the ability of the Park residents to maintain the integrity of their homes.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed to, the parties hereto hereby agree as follows:

1. **Recitals.** The Recitals set forth above are incorporated herein as though fully set forth herein.

2. **Assignment of Rights and Consent to Appeal.** The Assignor hereby assign any and all rights to appeal the City of San Clemente Planning Division's denial of the Lot 22 Permit Application to CSI. The Assignor hereby consents to CSI filing the Appeal on behalf of Lot 22. The process for the appeal would generally be a hearing before the City of San Clemente Planning Commission. If the Planning Division's decision is not reversed by the Planning Commission, then an appeal and hearing before the City Council. City Council files a Writ of Mandamus (collectively these actions, the "**Appeal**").

3. **Costs and Fees.** The Appeal shall be pursued by CSI at its sole cost and expense. The Assignor shall have no obligation to pay CSI or any other party any funds, costs, expenses, or otherwise in connection with the Appeal.

4. **Further Cooperation.** The parties hereto fully agree to cooperate with each other in the satisfaction of this Agreement, including without limitation, the Assignor executing, signing, notarizing, or agreeing to any reasonable documentation that may be required by CSI or any governmental agency in connection with the Appeal.

5. **No Guarantee Regarding Success or Consequences of Appeal.** Nothing in this Agreement shall be construed to be a guarantee or warranty as to the success or outcome of the Appeal. Furthermore, CSI makes no guarantee or warranty regarding any direct or indirect consequences that may incur to the manufactured home located on Lot 22 should the Appeal be unsuccessful. Specifically excluded from this Agreement are any legal, regulatory, or other matters before the California Coastal Commission.

6. **Joint and Several Liability.** If either party consists of more than one person or entity, each of them is and shall be jointly and severally liable for the obligations, conditions, and requirements set forth in this Agreement and the obligations, conditions, and requirements shall be binding upon each and all of the persons or entities executing this Agreement with the same force and effect as if each and all of them had so acted or signed.

7. **Miscellaneous**. The captions use din this Agreement are for conveniences only, and shall have no effect upon the interpretation of this Agreement. If any portion of this Agreement is declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable, such portion shall be deemed severed from this Agreement and the remaining portions or parts shall remain in full force and effect. This Agreement may be executed in counterparts and the signature pages combined to create one and the same instrument.

Signed copies of this Agreement transmitted by electronic mail or facsimile shall be treated the same as originals. This Agreement shall be construed and enforced in accordance with the laws of the state of California without regard to choice of law provisions. This Agreement shall be binding upon and inure to the benefit of each party, and their respective successors and assigns.

8. **Penalty of Perjury**. By signing below, the parties to this Agreement declare and affirm under penalty of perjury that the statements made in this Agreement are true and correct to their best of their knowledge, information, and belief.

IN WITNESS WHEREOF, the parties hereto do hereby enter into this Agreement on the Effective Date set forth above.

"ASSIGNOR"
WILLS REVOCABLE LIVING TRUST
DATED 11/23/99

By: _____
Name: Eric Wills, Trustee

"CSI"
CAPISTRANO SHORES, INC.,
a California non-profit mutual benefit corporation

By: _____
Name: MARK HOWLETT
Its: PRESIDENT

Exhibit 4

This Document was electronically recorded by Chicago Title Commercial

Recorded in Official Records, Orange County
Tom Daly, Clerk-Recorder

35.00
2008000037828 01:52pm 01/25/08

119 59 G02 4
0.00 0.00 20.00 0.00 9.00 0.00 0.00 0.00

Order No.
Escrow No.

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO
AND MAIL TAX STATEMENTS TO:

Capistrano Shores, Inc.
1880 N. El Camino Real
San Clemente, CA 92672

Space above this line for Recorder's Use

DOCUMENTARY TRANSFER TAX $___*___
.... Computed on the full consideration or value of property conveyed; OR
.... Computed on the consideration or value less liens or encumbrances remaining at time of sale.

Signature of Declarant or Agent determining tax – Firm Name

*Documentary transfer tax is not shown pursuant to Section 11932 of the California Revenue and Taxation Code as amended.

A.P.N. 691-432-01

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the TRUSTEES OF AMHERST COLLEGE, a 501(c)(3) non-profit corporation, hereby GRANTS to CAPISTRANO SHORES, INC., a California non-profit mutual benefit corporation, that certain real property in the County of Orange, State of California, as more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference, subject to matters of record.

Dated: January 23, 2008

TRUSTEES OF AMHERST COLLEGE,
a 50(c)(3) non-profit corporation

By: _____
Shannon D. Gurek

Its: _____
Associate Treasurer

MAIL TAX STATEMENTS AS DIRECTED ABOVE

HurstelRV\564599.1
7107574Z-X59

MASSACHUSETTS ALL-PURPOSE ACKNOWLEDGMENT

Gov. Exec. Ord. #455 (03-13), §5(d)

Commonwealth of Massachusetts
County of Hampshire } ss.

On this the 21st Day day of January Month, 2008 Year, before me,

Nancy A. Brownfield Name of Notary Public, the undersigned Notary Public,

personally appeared Shannon D. Gurek Name(s) of Signer(s),

proved to me through satisfactory evidence of identity, which was/were

personally known by Notary Description of Evidence of Identity,

to be the person(s) whose name(s) is/are signed on the preceding or attached document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose(.)

☐ as partner(s) for _____ Name of Partnership

_____, a partnership.

☒ as Associate Treasurer Title of Office for

Amherst College Name of Corporation, a corporation.

☐ as attorney in fact for _____ Name of Principal Signer

_____, the principal.

☐ as _____ Type of Capacity for _____

_____ Name of Person/Entity, a/the _____ Type of Entity.

NANCY A. BROWNFIELD
Notary Public
Commonwealth of Massachusetts
My Commission Expires Jan 22, 2010

Nancy A. Brownfield Signature of Notary Public

Nancy A. Brownfield Printed Name of Notary

Place Notary Seal and/or Any Stamp Above

My Commission Expires January 22, 2010

OPTIONAL

Although the information in this section is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Right Thumbprint of Signer
Top of thumb here

Description of Attached Document

Title or Type of Document: Grant Deed Capistrano Shores

Document Date: 1/23/08 signed 1/21/08 Number of Pages: 1 Exhibit A Attached (2 pages)

Signer(s) Other Than Named Above: None

EXHIBIT "A"
LEGAL DESCRIPTION OF PROPERTY

PARCEL 1:

THAT PORTION OF SECTION 32, TOWNSHIP 8 SOUTH, RANGE 7 WEST, SAN BERNARDINO BASE AND MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST NORTHERLY CORNER OF TRACT NO. 981, AS SHOWN ON A MAP RECORDED IN BOOK 31, PAGE 26 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, CALIFORNIA; RUNNING THENCE NORTH 46° 27' WEST 3182.22 FEET ALONG THE NORTHWESTERLY PROLONGATION OF THE NORTHEASTERLY LINE OF SAID TRACT TO THE SOUTHEASTERLY LINE OF THE LAND CONVEYED TO HERMANN H. GOLDSCHMIDT BY DEED RECORDED JULY 21, 1941 IN BOOK 1100, PAGE 480 OF OFFICIAL RECORDS, SAID POINT ALSO BEARS SOUTH 43° 59' WEST FROM ENGINEERS STATION 232 + 73.32 FEET OF THE CALIFORNIA STATE HIGHWAY DESIGNATED AS DIVISION VII, ORANGE COUNTY ROUTE 2, SECTION A, APPROVED SEPTEMBER 22, 1914; THENCE SOUTH 43° 59' WEST 140 FEET, MORE OR LESS, TO AN INTERSECTION WITH THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN; THENCE IN A SOUTHEASTERLY DIRECTION ALONG ABOVE MENTIONED HIGH TIDE LINE TO AN INTERSECTION WITH NORTHWESTERLY LINE OF TRACT NO. 981; THENCE NORTH 43° 33' EAST 110 FEET, MORE OR LESS, TO THE POINT OF BEGINNING.

EXCEPTING ANY PORTION OF THE LAND BELOW THE LINE OF ORDINARY HIGH WATER WHERE IT WAS LOCATED PRIOR TO ANY ARTIFICIAL OR AVULSIVE CHANGES IN THE LOCATION OF THE SHORELINE.

EXHIBIT "A"
LEGAL DESCRIPTION OF PROPERTY

PARCEL 2A:

LOTS 1 THROUGH 16, INCLUSIVE OF TRACT NO. 981, SAN CLEMENTE, THE SPANISH VILLAGE, AS SHOWN ON A MAP RECORDED IN BOOK 31, PAGE 26 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, CALIFORNIA.

EXCEPTING THEREFROM ONE-HALF OF ALL OIL, GAS AND OTHER HYDROCARBONS AND MINERALS PRODUCED FROM SAID PROPERTY TOGETHER WITH ONE-HALF OF ALL BONUSES FOR AND ALL RENTS AND OTHER LESSOR BENEFITS UNDER ANY LEASE FOR THE PRODUCTION OF SAID SUBSTANCES TOGETHER WITH ONE-HALF OF THE RENT AND/OR ROYALTIES AND BONUSES RECEIVED FOR THE USE OF ANY SITE OR SITES LOCATED ON SAID PROPERTY FOR DRILLING, AND/OR BORING BY WHIPSTOCKING OR DIRECTIONAL DRILLING FOR THE PRODUCTION AND REMOVAL OF OIL, GAS AND OTHER HYDROCARBONS AND MINERALS FROM AND UNDER LANDS OTHER THAN THE REAL PROPERTY DESCRIBED HEREIN, INCLUDING ONE-HALF OF THE RENT AND/OR ROYALTIES AND BONUSES RECEIVED FOR PERMITTING MINING, DRILLING AND/OR FOR OIL, GAS AND OTEHR HYDROCARBONS AND MINERALS BY WHIPSTOCKING OR DIRECTIONAL DRILLING, MINING OR BORING THEREFOR FROM LANDS OTHER THAN, AND ONLY UNDER AND THROUGH, THE REAL PROPERTY DESCRIBED HEREIN, AS RESERVED IN A DEED FROM BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, RECORDED MAY 18, 1959 IN BOOK 4717, PAGE 330 OF OFFICIAL RECORDS.

ALSO EXCEPTING ANY PORTION OF THE LAND BELOW THE LINE OF ORDINARY HIGH WATER WHERE IT WAS LOCATED PRIOR TO ANY ARTIFICIAL OR AVULSIVE CHANGES IN THE LOCATION OF THE SHORELINE.

PARCEL 2B:

AN EASEMENT FOR ACCESS, INGRESS AND EGRESS FOR THE BENEFIT OF LOTS 1 THROUGH 16 INCLUSIVE OF TRACT NO. 981, "THE SPANISH VILLAGE" AS SHOWN ON A MAP RECORDED IN BOOK 31, PAGE 26 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, CALIFORNIA, OVER THAT CERTAIN STRIP OF LAND DELINEATED AS "SENDA DE LA PLAYA" ON THE MAP OF SAID TRACT NO. 981.

END OF LEGAL DESCRIPTION

Exhibit 5

ACTION OF THE CITY COUNCIL OF THE
CITY OF SAN CLEMENTE, CALIFORNIA

Addressed to: SAN CLEMENTE PLANNING COMMISSION — August 20, 1959

Copy to: Mr. Roger C. Holden

A regular meeting of the City Council of the City of San Clemente, California, was held August 19, 1959 at 8:00 P.M.

Present: Councilmen - BLAKELOCK, FESSENDEN, LOWER, MILLER & EYRE
Absent: Councilmen - NONE

Subject: Request of Mr. Roger C. Holden for a conditional permit to install a Mobile Home Park in the area of the North Beach.

Letter was presented from the SAN CLEMENTE PLANNING COMMISSION recommending that the request of Mr. Roger C. Holden for a conditional permit to install a Mobile Home Park in the area of the North Beach (formerly tentative Tract No. 3192), be granted.

Following discussion, the City Clerk was directed to publish Notice calling for a Public Hearing on this matter to be held September 16, 1959.

State of California)
County of Orange) ss
City of San Clemente)

I, MAX L. BERG, City Clerk and ex-officio Clerk of the City Council of the City of San Clemente, California, do hereby certify the foregoing to be the official action as taken by the City Council at the above meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of August, 1959.

MAX L. BERG
City Clerk and ex-officio Clerk
of the City Council of the
City of San Clemente

ACTION OF THE CITY COUNCIL OF THE
CITY OF SAN CLEMENTE, CALIFORNIA

Addressed to: ✓ SAN CLEMENTE PLANNING COMMISSION

Copy to: MR. ROGER C. HOLDEN

A regular meeting of the City Council of the City of San Clemente, California, was held Sept. 16, 1959 at 8:00 P.M.

Present: Councilmen - BLAKELOCK, FESSENDEN, LOWER, MILLER & EYRE
Absent: Councilmen - NONE

Subject: Public Hearing to grant conditional permit (Holden request)

The Mayor announced that this was the time and place fixed by the City Council of the City of San Clemente to consider and determine the recommendation of the Planning Commission to grant Mr. Roger C. Holden a conditional permit to construct a Mobile Home Park on the North Beach area (formerly tentative Tract No. 3192).

The Mayor inquired if there were any written or oral protests of objections, and there being none, IT WAS MOVED BY COUNCILMAN BLAKELOCK, SECONDED BY COUNCILMAN LOWER AND UNANIMOUSLY CARRIED that a conditional permit to construct a Mobile Home Park on the North Beach area, as per request submitted by Mr. Roger C. Holden, and as recommended by the Planning Commission, be granted.

State of California }
County of Orange } ss
City of San Clemente }

I, MAX L. BERG, City Clerk and ex-officio Clerk of the City Council of the City of San Clemente, California, do hereby certify the foregoing to be the official action as taken by the City Council at the above meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 21st day of September, 1959.

MAX L. BERG
City Clerk and ex-officio Clerk
of the City Council of the
City of San Clemente

Exhibit 6

ZOAC 9 - PART A

December 9, 1993

TO: ZONING ORDINANCE ADVISORY COMMITTEE

FROM: Kelly Main, Associate Planner

SUBJECT: OPEN SPACE ZONES

BACKGROUND

General Plan Policies

The 1992 General Plan created several new categories of open space designations within the City. Formerly, the 1982 General Plan had two open space land-use designations: O-A, Open Area and Recreational; and O-S, Open Space. The O-A designation was typical of open space designations found in other cities, preserving areas for passive and recreational open space. The O-S designation was atypical of open space designations found in other cities and can more accurately be described as a residential/open-space designation; a variety of uses, including "clustered" residential development at 1.5 units per acre, was allowed under the O-S designation.

The 1992 General Plan has replaced the previous two open space land-use designations with the following five, none of which allow residential development:

OS 1 - Publicly-owned open space consisting of existing and dedicated parklands, parking lots and other open space;

OS 2 - Privately-owned open space intended as open space for passive recreation, aesthetic, golf courses and ancillary uses and/or resource management purposes;

OS 3 - Privately-owned, restricted by easement, and intended as open space for passive recreation, aesthetic, and/or resource management purposes;

OSC - Public and private golf courses and ancillary facilities;

OSR - Talega Reserve

A general discussion regarding the new open space land-use designations and policies can be found on pages 1-33 through 1-35 of the General Plan, under the section Open-Space Land-Use Policies. (Please refer to Table 1-3 of the General Plan, page 1-18, under Open Space, for a summary of the land-use designations.) The following are the General Plan

policies found in the Land-Use section of the document that apply to all the open space land-use designations:

1.1.3 Accommodate land-use development in accordance with the patterns and distribution of use and density depicted on the Land-Use Plan Map and the following principles:

e. Establishment of linkages among community areas, which may include, but not be limited to, pedestrian and vehicular paths, continuity of landscape, signage, and other urban-design elements, use of open space, transitions in form, scale, and density of development, and other elements (*I 1.1, I 1.3, I 1.5, I 1.7, and I 1.17*).

1.9 Preserve open spaces for the City's residents which provide visual relief, amenity and recreational opportunities, protect environmental resources, protect the population from environmental hazards, and are in balance with new development.

A. *General Policies*

1.9.1 Designate lands for the provision of recreational open spaces on the Land-Use Plan Map which are sufficient to meet the needs of existing and future residents (*I 1.1, I 1.3, and I 1.5*).

1.9.2 Designate lands for the provision of passive and visual open space on the Land-Use Plan Map, which provide a balance to the urban and suburban development of the City (*I 1.1, I 1.3, and I 1.5*).

1.9.3 Designate lands for the protection of significant environmental resources and protection of life and property from environmental hazards on the Land-Use Plan Map (*I 1.1, I 1.3, and I 1.5*).

B. Design and Development

1.9.8 Require that developers of residential, mixed-use, and other projects whose scale may significantly impact existing open-space resources allocate sufficient lands as permanent open space for recreation, visual relief, and/or environmental-resource protection (by dedication, easement, or other City-approved technique) (*I 1.1, I 1.2, and I 1.5 through I 1.7*).

1.9.9 Limit designated open spaces to uses which are compatible with this purpose, such as passive recreation and nature observation (*I 1.1, I 1.2, I 1.5, and I 1.6*).

1.9.10 Provide for the development of additional open spaces for recreational purposes in accordance with the Parks and Recreation Element and Master Plan of Parks and Recreation (*I 1.1, I 1.2, I 1.6, and I 1.7*).

1.9.15 Maintain open spaces to protect life and property from flooding, landslide, and other environmental hazards, where these cannot be mitigated, in accordance with the Utilities, Flooding, and Seismic Safety Elements (*I 1.1, I 1.2, I 1.5, I 1.6, I 1.8, and I 1.9*).

The following implementation programs affecting open space are from the Public Facilities and Services section of the General Plan:

I 7.31 Modify the City's zoning ordinance, where appropriate, to permit the development of the arts, cultural, educational, and related uses in key activity areas of the City with particular emphasis on increasing these uses in the downtown. Incorporate standards which will allow for temporary and permanent artistic, cultural, and entertainment activities within public and private buildings and open spaces. (pg. 7-22)

I 7.35 The City shall provide for the use and exhibition of art and public performance spaces in the urban design improvement of public open spaces. These shall be incorporated as design and development plans are prepared for pedestrian-oriented areas in the downtown. (Pg. 7-23).

San Clemente's Existing Open Space Zoning Designations

San Clemente has a number of existing open space zones outside the Specific Plan areas:

O-A:	Open Area and Recreation
O-S:	Open Space (which also allows for residential development up to 1.5 dwelling units/gross acre)
S-1:	Shoreline District

Each open space zone is characterized by the types and intensities of uses allowed within the zone. These zones vary from allowing a significant number of uses (the O-S zone) to a very limited number of uses (the O-A zone). A synopsis of each zone follows:

A. *The O-A Zone*

The O-A zone is described in Section 4.22 of the Zoning Ordinance, Open Area and Recreation District, pages 266.172-173. Unlike most of the City's zoning designations, the O-A zone has a purpose statement:

> To promote and preserve open areas in an otherwise urban or semi-urban development to hold for future generations - open spaces in which trees and plants will be preserved.

The O-A zone is the most restrictive of the City's open space zones, meant to allow the least intensive activities and structures within the zone. Very few uses are listed as being allowed in the O-A zone. Attachment A, a matrix of the currently allowed and proposed uses in the City's open space zones, is included for your review. All uses listed for this zone require a conditional use permit. Examples of sites with the O-A designation can be found on Sheets 4 and 12 of the zoning maps. Both the Shorecliff Golf Course and the State Beach have the O-A designation. There are also no development standards for this zone, as they are specified through the use permit process.

B. *The O-S Zone*

The Committee partially reviewed the O-S (Open Space District) zone as part of its discussion on the residential zones in San Clemente. The existing O-S zone is a combination residential/open space zone. The zone allows residential development at 1.5 dwelling units per gross acre. The O-S zone also provides for clustered development, so that environmental and aesthetic open space resources can be preserved. The following is an excerpt from the Intent and Purpose section for the O-S zone:

> ...to specify open space as the principal use of the land and all structures except residences, as accessory uses subject to a low percentage of area...to facilitate the creation, expansion and conservation of open spaces that provide the setting for urban development and visual amenities for people.

The OS zone is covered in Section 4.21, Open Space District, pages 266.121 through 266.171 of the City's Zoning Ordinance. This section of the Ordinance is quite lengthy, with the majority of it consisting of an intent and purpose section and a list of permitted and conditional uses. Attachment A, the matrix listing the permitted and conditional uses in the City's existing open space zones, includes the O-S zone. Examples of sites with the O-S zoning designation can be found on Sheets 13 and 18 of the City's zoning maps.

A review of the permitted and conditional uses for the O-S zone illustrates the significant intensity of development allowed in a zone normally associated with less intense uses. The 1982 General Plan category corresponding to this zone, also labelled O-S, has essentially been eliminated in the City by the 1992 General Plan, (for all but the Verde Canyon site, see discussion in ZOAC 7 staff report on residen-

tial zones). All of the areas of the City which previously were designated with the O-S General Plan designation have been redesignated by the new General Plan into separate residential and open space areas (areas where residential development is not allowed). A list of many of these developments is attached with this staff report (Attachment B).

The following is a synopsis of the existing development standards for the O-S zone:

Min Lot Area for non-residential uses: 1 acre
Min Site Area for Planned Development: 5 acres
Permitted Density: 1 unit/lot
Min Lot Width: N/A
Max Bldg Coverage: N/A
Site Dev Stds:
- Front: 25 ft
- Side/Inter: 10 ft
- Side/Corner: 10 ft
- Rear: 25 ft
- Height: 30 ft; 2 stories maximum

Because the new open space designations substantially differ from the existing O-S zone, this zone will essentially be eliminated and replaced with zoning that complies with the more traditional concept of open space contained in the new General Plan.

C. *The S-1 Zone*

The S-1 (Shoreline District) zone can be found in Section 4.20 of the Zoning Ordinance, page 266.160. Much like for the O-A zone, very little information is provided for this zone. No purpose and intent section is provided, and a brief list of conditional uses is given (included in Attachment A). The only development standard provided is a height limit of 25 feet.

The S-1 zone covers San Clemente's beaches, along the entire length of the City. San Clemente's shoreline is included on Sheets 1 through 7 of the zoning maps.

The remainder of the report is divided into sections on the new General Plan designations. Each designation is described, the existing zoning covered by the new designations is discussed, and new standards proposed.

PUBLICLY-OWNED OPEN SPACE (OS 1)

General Plan Policies

The first category of open space listed in the General Plan is that of publicly-owned open space, to include dedicated parklands, parking lots and other areas. The General Plan includes the following specific policy related to the OS 1 designation:

1.9.4 Accommodate active parklands, beaches, or other open-space uses in areas designated as "OS 1" (encompasses publicly-owned properties) in accordance with the standards stipulated in Table 1-3 (*1 1.1 through 1 1.3, 1 1.5, and 1 1.6*).

Existing Zoning

Sites with this new General Plan designation currently have a variety of zoning designations:

- O-A - San Clemente State Beach (Sheet 1 of the zoning maps) and Max Berg Park (Sheet 7), are two examples;
- O-S - An open space area to the east of Avenida Salvador and west of Avenida San Pablo (Sheet 9);
- R-1 - An area on the north side of Avenida Acapulco and south of Calle Cuervo (Sheet 16) and the site adjacent to Concordia Elementary School and San Clemente State Beach (Sheet 4);
- S-1 - The San Clemente shoreline, from North Beach to the State Beach (Sheets 2,3, and 7).

The uses and standards of the R-1 and O-S zones are not compatible with the OS 1 designation described in the General Plan; the O-A and S-1 zones (particularly the list of permitted and conditional uses) are compatible with OS 1, however, purpose and intent sections, as well as some development standards, must be developed for both zones.

Proposed Standards - The O-A Zone (Publicly-Owned)

A. *Purpose and Intent*

- To promote and preserve open areas to hold for future generations for the preservation of environmental and aesthetic resources, including topographical features, and protection of life and property from environmental hazards;
- To designate public lands for the provision of recreational open space, permitting a range of activities from passive recreational uses such as hiking to more intensive, active recreational activities including outdoor and indoor recreational facilities.

Exhibit 7

2014 ANNUAL PERMIT TO OPERATE

City of San Clemente Building Division

ENFORCEMENT AGENCY

PERMIT NO. 2
DATED: 12/10/13
AMENDED

PARK ID NO
30-116

PARK NAME and ADDRESS

Capistrano Shores Inc.
1880 N. El Camino Real
San Clemente, CA 92672

INC. or UNC.	MOBILEHOME LOTS WITH DRAINS	RECREATIONAL VEHICLE LOTS WITH DRAINS	LOTS WITHOUT DRAINS	TOTAL LOTS
Inc.	90			90

CONDITIONAL USES:

Only independent mobile homes may be accommodated. Only vehicles bearing Department of Housing & Community Development insignia of approval may be installed on all lots. Recreational vehicle lots without traps or vents.

OWNER: Capistrano Shores Inc.
1880 North El Camino Real
San Clemente, CA 92672

THIS PERMIT IS ISSUED IN ACCORDANCE WITH THE PROVISIONS OF THE CALIFORNIA HEALTH AND SAFETY CODE AND IS SUBJECT TO SUSPENSION OR REVOCATION AS PROVIDED THEREIN. THIS PERMIT IS NOT TRANSFERABLE. THE ENFORCEMENT AGENCY SHALL BE NOTIFIED WITHIN 30 DAYS OF ANY CHANGE OF NAME, OWNERSHIP, OR OPERATOR.

HCD 503B (7/04)

POST IN A CONSPICUOUS PLACE
THIS PERMIT EXPIRES DECEMBER 31, 2014

Exhibit 8

PERMIT APPLICATION

Permit # | Supplement #

JOB ADDRESS 1880 N. El Camino Real #22 Valuation $ 100,000

Tract _____ Lot _____ APN 915-010-22

Who do you want us to contact with Plan Check results?

Name Eric Anderson

Wk Ph # _____ Cell Ph # 949 351-9642

Email Address eanderson@CapoShores.com

- ☐ Single Family Residence
- ☐ Multi Family Res # of Units____
- ☐ Commercial/Industrial
- ☐ Mixed Use Bldg
  - Retail Units # _____
- ☐ Accessory/Detached Bldg
- ☒ Mobile Home
- ☐ PhotoVoltaic System
- ☐ Pool/Spa
  - Residential Units # _____

Square Feet	Building	Garage	Patio Cover	Deck	Porch
Existing	900				
New Bldg	1,248				
Addition					
Demo					
Remodel					
Repair					
Reconstruct					
Tenant Impr.					

# of Units 1 Stories (E) # 1 Stories (New) # 1

Existing Sprinklers? Y (N) New Sprinklers? (Y) N

Fireplaces (E) # — (New) # — Skylights (E) # — (New) # 3

OCFA SR # _____ (if applicable)

SIGNATURE

Date

Property Owner Name Wills Revocable Living Trust Phone # 714-473-3058

Address 1880 N. El Camino Real City/St/Zip SC, CA. 92672

Email address cwills@CapoShores.com

~~Architect/Designer Name~~ Manufacturer: Silvercrest

Address 299 N. Smith Ave City/St/Zip Corona, CA. 92880

Phone # Fax # State Lic #

Email address

Engineer Name

Address City/St/Zip

Phone # Fax # State Lic #

Email address

Tenant Name

Tenants may NOT pull building permits

Unit/Suite # Phone #

Email address

~~Contractor Name~~ Installer: Best Choice Manufactured Housing Contractor

Address: 17800 S. Main St. #203 City/St/Zip Gardena, CA. 90248

Phone # 310-702-4237 State Lic # 790397 Classification

Email address info@bestchoicemhc.com

DESCRIPTION OF WORK

Replace existing 900 sq ft mobile home with 1,248 sq. ft. mobile home.

1st Submittal

Date due

2nd Submittal

Date due

3rd Submittal

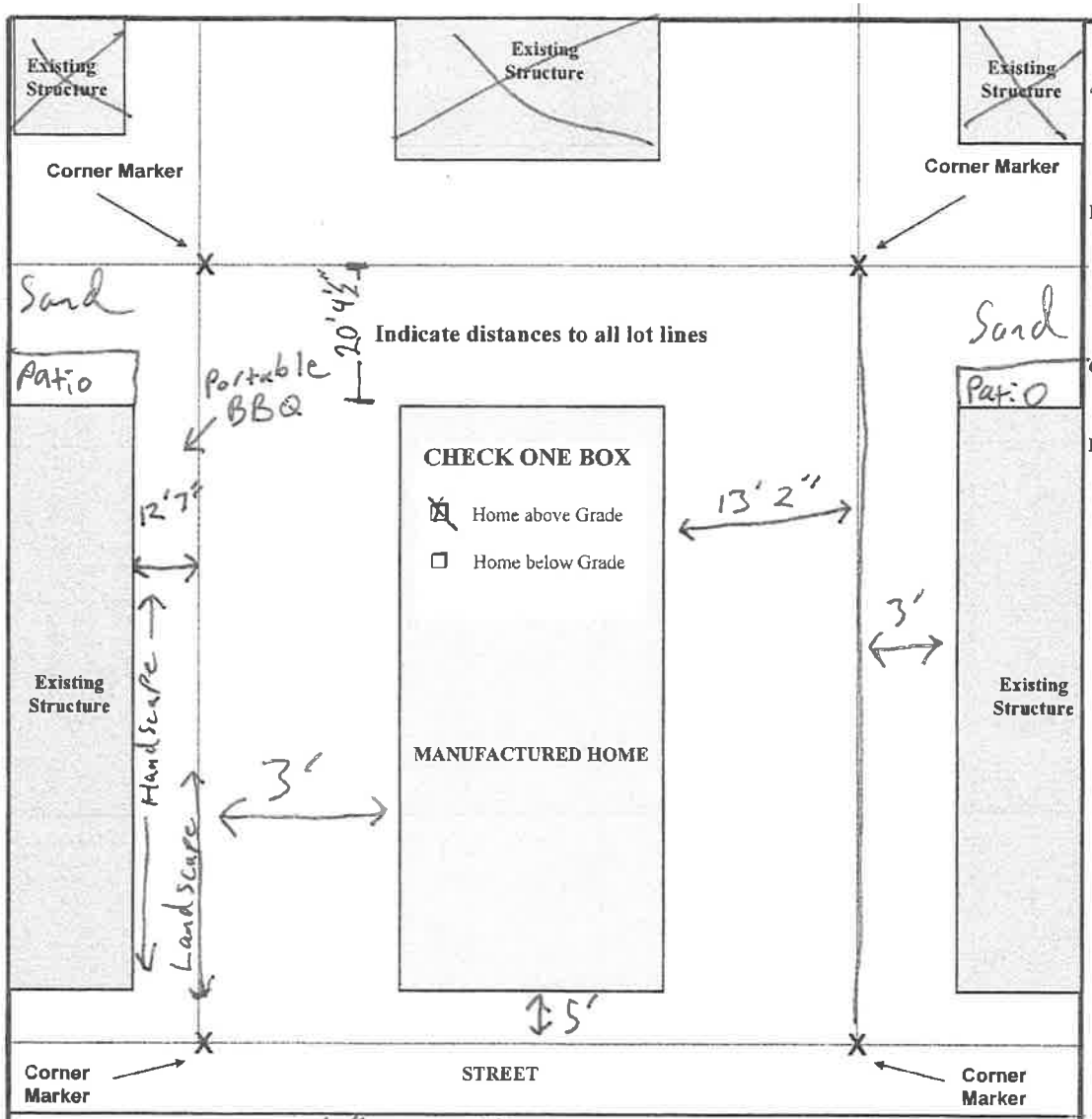
Date due

4th Submittal

Date due

☒ Owner/Agent ☐ Architect/Designer ☐ Contractor/Agent ☐ Engineer ☐ Tenant

ORIGINAL & 2 COPIES REQUIRED WITH THE PERMIT APPLICATION



Width and length of lot: 40'2" x 77'4½" **Width and length of home** 24' x 52'

1. Draw any proposed structure(s) and existing structures on the diagram above at the approximate location and identify the type of structures (e.g. deck, awning, etc). Indicate the distance from the lot line to the proposed structure. Also indicate the length and width of the structure.
2. Indicate the exact distances from structures on adjacent lots if located within 10 (ten) feet of your lot line.
3. Enter length & width of the manufactured home (including eaves) and length & width of lot.
4. No vegetation is allowed under the manufactured home or habitable accessory structure. Lot must be properly graded to ensure that water cannot accumulate beneath the manufactured home.

LOT PLOT PLAN AND PARK INFORMATION

A) Park Name Capistrano Shores
Homeowner Name Wills Revocable Living Trust [illegible]
Homeowner Address 1880 W. El Camino Sp#
City San Clemente Zip 92672

B) Design Information:
Home Amperage: 100 Pedestal Amperage: 100
Home Voltage: 120 Pedestal Voltage: 120
Home Roof Load: 20 PSF
Roof Load for locality: 20 PSF

C) Is the park located in a snow area requiring 30 lb or greater roof loading? ☐ YES ☒ NO

D) The lot line corners at the front and rear are clearly and permanently marked pursuant to Title 25 of the California Code of Regulations, Sections 1104 or 2104 in the following manner:

YES

NOTE: Each lot line corner shall be clearly and permanently marked prior to installation and inspection.

STATEMENT OF RESPONSIBILITY
(ORIGINAL SIGNATURE REQUIRED)

As the park owner or operator, or as his or her authorized representative, I hereby certify that the information provided on this plot plan relative to the location of the manufactured home, all related accessory structure locations and separations and the park and homeowner information is true, accurate and complete. Lot corners have been identified as in item D above.

Signature of Park Owner, Operator, or Manager

State of California
Department of Housing and Community Development
Division of Codes and Standards

Northern Area Office
9342 Tech Center Drive, Suite 550
Sacramento, CA 95826

Southern Area Office
3737 Main St. Ste 400
Riverside, CA 92501

HCD 538 Revised 7/04

Exhibit 9

Exhibit 9

Merged With Exhibit 2 for Continuity

Exhibit 10

Exhibit 10
Deleted

Exhibit 11

STATE OF CALIFORNIA -BUSINESS, TRANSPORTATION AND HOUSING AGENCY Arnold Schwarzenegger, Governor

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF CODES AND STANDARDS
1800 Third Street, Room 260, P.O. Box 1407
Sacramento, CA 95812-1407
From TDD Phones 1 (800) 735-2929
(916) 445-9471 FAX (916) 327-4712
www.hcd.ca.gov

September 10, 2004

Ernesto Alvarez
County of San Diego

This letter is in response to your request for clarification regarding the installation of two-story manufactured homes in existing parks.

All manufactured homes are approved under federal regulations whether they are single-wides or multi-sectional, one-story or two-story. Neither federal law nor state laws nor regulations adopted to implement those laws make any distinction between the number(s) of sectional units that comprise a manufactured home, the configuration of those sections as used to complete the unit, nor its installed height. This is also evident by the definition of a manufactured home in California Health and Safety Code (HSC) section 18007 which states in part: "*...a structure, transportable in one or more sections ...*".

Because a lot in a mobilehome park may be occupied by one "unit", defined in Title 25, section 1002 (u) of the California Code of Regulations as, "*A manufactured home, mobilehome, multi-unit manufactured housing, or recreational vehicle*" it is the long standing opinion of the Department of Housing and Community Development that any style manufactured home complying with these preemptive regulations, regardless of its configuration, may be installed on a lot within a park. These regulations are preemptive throughout the state and are applicable in all privately owned mobilehome parks.

I should also point out that Multi-Unit Manufactured Housing (duplexes, triplexes, even fourplexes), as defined in section 18008.7 of the HSC and noted in the definition of a "unit", are also allowed on an existing lot within a park. These units do however require additional approvals because they impact the local infrastructure due to the increased number of dwelling(s).

As you are aware, a manufactured home is constructed and approved under the requirements of the National Manufactured Housing Construction and Safety Standards Act of 1974 contained in Title 42 of the United States Code commencing with section 5401. This Act provides the authority for the construction standards contained in Title 24 of the Code of Federal Regulations, Part 3280. These construction standards are also preemptive, applicable nationwide and regulate the construction of all manufactured homes constructed after June 15, 1976 which was the effective date of the regulations. Current California residential building standards, as adopted by the state under the State Housing Law, do not apply to manufactured homes. Additionally, California Health and Safety Code (HSC) section 18025.5 charges the Department of Housing and Community Development with enforcement of these federal regulations, applicable to the construction of manufactured homes, throughout the state.

It is understood that there may be opposition to two-story manufactured homes and multi-unit manufactured housing just as there was when double-wide homes started to become popular. Since state regulations for manufactured home installations are preemptive throughout the state, and there is nothing in regulation that would prohibit the installation of these units in a park, as previously stated it is the Departments' opinion that two-story manufactured homes be allowed to be installed in mobilehome parks throughout the state provided all applicable regulations are complied with.

If I can be of further assistance please fell free to contact me at (916) 324-4907 or by email at bharward@hcd.ca.gov.

Brad Harward, CSA I
Mobilehome Parks Program Manager

Exhibit 12

LexisNexis

176 cal app 4th 1270

Sequoia Park Associates v. County of Sonoma, 176 Cal. App. 4th 1270 (Copy citation)

Court of Appeal of California, First Appellate District, Division Two
August 21, 2009, Filed
A120049

Reporter: 176 Cal. App. 4th 1270 | 98 Cal. Rptr. 3d 669 | 2009 Cal. App. LEXIS 1397

SEQUOIA PARK ASSOCIATES, Plaintiff and Appellant, v. COUNTY OF SONOMA, Defendant and Respondent.

Subsequent History: Later proceeding at Sequoia Park Associates v. County of Sonoma, 2009 Cal. LEXIS 11292 (Cal., Oct. 20, 2009)
Review denied by, Request denied by Sequoia Park Assocs. v. County of Sonoma, 2009 Cal. LEXIS 12846 (Cal., Dec. 2, 2009)

Prior History: Superior Court of Sonoma County, No. SCV240003, Raymond J. Giordano, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.).

Core Terms

conversion, mobile home park, ordinance, subdivider, preemption, tenant, mobile home, state law, ownership, preempt, occupy, map, rend, local authority, local ordinance, household, convert, space, rental, local legislation, tentative, local government, parcel map, displacement, state concern, identification, partially, palm, duplicate, nonpurchase

Case Summary

Procedural Posture
Plaintiff mobilehome park operator appealed an order from the Superior Court of Sonoma County (California), which declined to issue a writ of mandate to prohibit defendant county's enforcement of an ordinance that imposed obligations related to mobilehome park conversion applications that went beyond the obligations required by Gov. Code, § 66427.5.

Overview
The challenged ordinance, Sonoma County Ord. No. 5725, directed an applicant seeking to convert an existing mobilehome park from a rental to a resident-owner basis to submit various reports required by state law. The ordinance also imposed criteria that had to be satisfied before the application would be presumed bona fide for purposes of approval. The court held that the ordinance was preempted by § 66427.5 in accordance with the constitutional principle of preemption set forth in Cal. Const., art. XI, § 7. The ordinance was expressly preempted because § 66427.5, subd. (e), limited the scope of a hearing for approval of a conversion application to the issue of compliance with § 66427.5; no minimum amount of tenant support was required for approval. The court surveyed the extensive state regulation of mobilehome parks and concluded that the ordinance also was preempted by implication because the legislature had established a dominant role for the State in regulating mobilehomes and had indicated its intent to forestall local intrusion regarding conversions. Moreover, the ordinance duplicated several features of state law by requiring compliance with state reporting requirements.

Outcome
The court reversed the order and remanded the cause to the trial court with directions to enter a new order declaring the ordinance invalid.

LexisNexis® Headnotes -Hide

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 An appellate court's review of a trial court's order is de novo when it involves a pure issue of law. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments

HN2 For the great number of preemption issues--particularly if the emphasis is on implied preemption--the state and the local legislation must be considered together. Only by looking at both can a court know if the local law conflicts with, contradicts, or is inimical to the state law. This is an established rule of preemption analysis. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Duties & Powers

HN3 See Cal. Const., art. XI, § 7. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments

HN4 A party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. Courts have been particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another, then the presumption favors the validity of the local ordinance against an attack of state preemption. Thus, when local government regulates in an area over which it traditionally has exercised control, such as particular land uses, California courts will presume, absent a clear indication of preemptive intent from the legislature, that such regulation is not preempted by state statute. The presumption against preemption accords with the more general understanding that it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Zoning > Ordinances

HN5 The general principles governing state statutory preemption of local land use regulation are well settled. Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith and contradictory to general law when it is inimical thereto. Local legislation enters an area fully occupied by general law when the legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. There are three recognized indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that is has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse

effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments

HN6 With respect to the implied occupation of an area of law by the legislature's full and complete coverage of it, where the legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. State regulation of a subject may be so complete and detailed as to indicate an intent to preclude local regulation. Whenever the legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned. When a local ordinance is identical to a state statute, it is clear that the field sought to be covered by the ordinance has already been occupied by state law. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments

HN7 To discern whether a local law has entered an area that has been fully occupied by state law according to the recognized indicia of intent requires an analysis that is based on an overview of the topic addressed by the two laws. In determining whether the legislature has preempted by implication to the exclusion of local regulation, a court must look to the whole scope of the legislative scheme. Such an examination is made with the goal of detecting a patterned approach to the subject, and whether the local law mandates what state law forbids, or forbids what state law mandates. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions

HN8 See Gov. Code, § 66427.5. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions

HN9 Under Gov. Code, § 66427.5, subd. (e), a city council only has the power to determine if a subdivider has complied with the requirements of the section. Although the conversion process might be used for improper purposes--such as the bogus purchase of a single unit by the subdivider/owner to avoid local rent control--the language of § 66427.5, subd. (e), does not allow such considerations to be taken into account. A city lacks authority to investigate or impose additional conditions to prevent sham or fraudulent transactions at the time it approves a tentative or parcel map. Although the lack of such authority may be a legislative oversight, and although it might be desirable for the legislature to broaden a city's authority, it has not done so. The argument that the legislature should have done more to prevent partial conversions or sham transactions is a legislative issue, not a legal one. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions

HN10 Case law has specifically rejected arguments that would require a numerical threshold before a mobilehome park conversion could proceed, there being no statutory support for the claim that conversion only occurs if more than 50 percent of the lots have been sold before a tentative or parcel map is filed. A subdivider need not demonstrate that the proposed subdivision has the support of a majority of existing residents--fixed at either one-half or two-thirds--thus satisfying the local authority that this was not a forced conversion. The legislative intent to encourage conversion of

mobilehome parks to resident ownership would not be served by a requirement that a conversion could only be made with resident consent. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Duties & Powers
Real Property Law > Zoning > Ordinances

HN11 Regulation of the uses of land within its territorial jurisdiction is one of the traditional powers of local government. *Shepardize* - Narrow by this Headnote

Governments > Legislation > Effect & Operation > Amendments
Governments > Legislation > Interpretation

HN12 When the legislature amends a statute without altering portions of the provision that have previously been judicially construed, the legislature is presumed to have been aware and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions
Real Property Law > Zoning > Ordinances

HN13 Gov. Code, § 66427.5, subd. (e), has the effect of an express preemption of the power of local authorities to inject other factors when considering an application to convert an existing mobilehome park from a rental to a resident-owner basis. *Shepardize* - Narrow by this Headnote

Headnotes/Syllabus - Hide

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court declined to issue a writ of mandate to prohibit a county's enforcement of an ordinance that imposed obligations related to mobilehome park conversion applications that went beyond the obligations required by Gov. Code, § 66427.5. The challenged ordinance, Sonoma County Ord. No. 5725, directed an applicant seeking to convert an existing mobilehome park from a rental to a resident-owner basis to submit various reports required by state law. The ordinance also imposed criteria that had to be satisfied before the application would be presumed bona fide for purposes of approval. (Superior Court of Sonoma County, No. SCV240003, Raymond J. Giordano, Temporary Judge.[*])

The Court of Appeal reversed the order and remanded the cause to the trial court with directions to enter a new order declaring the ordinance invalid. The court held that the ordinance was preempted by § 66427.5 in accordance with the constitutional principle of preemption set forth in Cal. Const., art. XI, § 7. The ordinance was expressly preempted because § 66427.5, subd. (e), limits the scope of a hearing for approval of a conversion application to the issue of compliance with § 66427.5; no minimum amount of tenant support is required for approval. The court surveyed the extensive state regulation of mobilehome parks and concluded that the ordinance also was preempted by implication because the Legislature has established a dominant role for the state in regulating mobilehomes and has indicated its intent to forestall local intrusion regarding conversions. Moreover, the ordinance duplicated several features of state law by requiring compliance with state reporting requirements. (Opinion by Richman, J., with Haerle, Acting P. J., and Lambden, J., concurring.) **[1271]**

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[1] (1)

Municipalities § 55 > Ordinances > Validity > Conflict with Statutes > Considering State and Local Legislation Together.

For the great number of preemption issues—particularly if the emphasis is on implied preemption—the state and the local legislation must be considered together. Only by looking at both can a court know if the local law conflicts with, contradicts, or is inimical to the state law. This is an established rule of preemption analysis.

CA(2)[2] (2)

Municipalities § 55 > Ordinances > Validity > Conflict with Statutes > Presumption Against Preemption.

A party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. Courts have been particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. The common thread of the cases is that if there is a significant local interest to be served that may differ from one locality to another, then the presumption favors the validity of the local ordinance against an attack of state preemption. Thus, when local government regulates in an area over which it traditionally has exercised control, such as particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute. The presumption against preemption accords with the more general understanding that it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.

CA(3)[3] (3)

Municipalities § 56 > Ordinances > Validity > Conflict with Statutes > Test for Preemption > Indicia of Intent.

The general principles governing state statutory preemption of local land use regulation are well settled. Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith and contradictory to general law when it is inimical thereto. Local legislation enters an area fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. There are three recognized indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly [1272] indicate that is has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

CA(4)[4] (4)

Municipalities § 56 > Ordinances > Validity > Conflict with Statutes > Test for Preemption > Indicia of Intent > Area Fully Occupied by State Law.

With respect to the implied occupation of an area of law by the Legislature's full and complete coverage of it, where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. State regulation of a subject may be so complete and detailed as to indicate an intent to preclude local regulation. Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned. When a local ordinance is identical to a state

statute, it is clear that the field sought to be covered by the ordinance has already been occupied by state law.

CA(5)[5] (5)

Municipalities § 56 > Ordinances > Validity > Conflict with Statutes > Test for Preemption > Indicia of Intent > Area Fully Occupied by State Law.

To discern whether a local law has entered an area that has been fully occupied by state law according to the recognized indicia of intent requires an analysis that is based on an overview of the topic addressed by the two laws. In determining whether the Legislature has preempted by implication to the exclusion of local regulation, a court must look to the whole scope of the legislative scheme. Such an examination is made with the goal of detecting a patterned approach to the subject, and whether the local law mandates what state law forbids, or forbids what state law mandates.

CA(6)[6] (6)

Mobilehomes, Trailers, and Parks § 3 > Regulation > Conversion from Rental to Resident-owned > Local Regulation Preempted.

Under Gov. Code, § 66427.5, subd. (e), a city council only has the power to determine if a subdivider has complied with the requirements of the section. Although the conversion process might be used for improper purposes—such as the bogus purchase of a single unit by the [1273] subdivider/owner to avoid local rent control—the language of § 66427.5, subd. (e), does not allow such considerations to be taken into account. A city lacks authority to investigate or impose additional conditions to prevent sham or fraudulent transactions at the time it approves a tentative or parcel map. Although the lack of such authority may be a legislative oversight, and although it might be desirable for the Legislature to broaden a city's authority, it has not done so. The argument that the Legislature should have done more to prevent partial conversions or sham transactions is a legislative issue, not a legal one.

CA(7)[7] (7)

Mobilehomes, Trailers, and Parks § 3 > Regulation > Conversion from Rental to Resident-owned.

Case law has specifically rejected arguments that would require a numerical threshold before a mobilehome park conversion could proceed, there being no statutory support for the claim that conversion only occurs if more than 50 percent of the lots have been sold before a tentative or parcel map is filed. A subdivider need not demonstrate that the proposed subdivision has the support of a majority of existing residents—fixed at either one-half or two-thirds—thus satisfying the local authority that this was not a forced conversion. The legislative intent to encourage conversion of mobilehome parks to resident ownership would not be served by a requirement that a conversion could only be made with resident consent.

CA(8)[8] (8)

Zoning and Planning § 3 > Authority for Regulation > Traditional Local Power.

Regulation of the uses of land within its territorial jurisdiction is one of the traditional powers of local government.

CA(9)[9] (9)

Statutes § 26 > Construction > Adopted and Reenacted Statutes > Legislative Acquiescence in Judicial Construction.

When the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.

CA(10) (10)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Conversion from Rental to Resident-owned > Local Regulation Preempted.

Gov. Code, § 66427.5, subd. (e), has the effect of an express preemption of the power of local authorities to inject other factors when considering an application to convert an existing mobilehome park from a rental to a resident-owner basis.

CA(11) (11)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Conversion from Rental to Resident-owned > Local Regulation Preempted.

It could be assumed that a county was motivated by laudable purposes when it **[1274]** enacted an ordinance that imposed obligations upon a subdivider submitting a mobilehome park conversion application that went beyond the obligations required by Gov. Code, § 66427.5. The county's construction of § 66427.5 also could find some plausibility from the statutory language. Nevertheless, the ordinance crossed the line established by the Legislature as marking territory reserved for the state and thus was expressly preempted by § 66427.5.

[Cal. Real Estate Law & Practice (2009) ch. 472, § 472.35; Cal. Forms of Pleading and Practice (2009) ch. 126A, Constitutional Law, § 126A.24; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 790; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 992.]

Counsel: Bien & Summers, Elliot L. Bien and Catherine Meulemans for Plaintiff and Appellant.

The Loftin Firm, L. Sue Loftin and Michael Stump for Rancho Sonoma Partners, Eden Gardens, Sundance Estates and Capistrano Shores as Amici Curiae on behalf of Plaintiff and Appellant.

Steven M. Woodside, County Counsel, Sue A. Gallagher and Debbie F. Latham, Deputy County Counsel, for Defendant and Respondent.

Aleshire & Wynder, William W. Wyoder and Sunny K. Soltani for California State Association of Counties, League of California Cities, City of Carson and the City of Los Angeles as Amici Curiae on behalf of Defendant and Respondent.

Judges: Opinion by Richman, J., with Haerle, Acting P. J., and Lambden, J., concurring.

Opinion by: Richman

Opinion

RICHMAN, J.—One of the subjects covered by the Subdivision Map Act (Gov. Code, § 66410 et seq.) is the conversion of a mobilehome park from a rental to a resident-ownership basis. One of the provisions on that subject is Government Code section 66427.5 (section 66427.5), which spells out certain steps that must be completed before the conversion application can be approved by the appropriate local body. Although it is not codified in the language of section 66427.5, the Legislature recorded its intent that by enacting section 66427.5 it was acting "to ensure that conversions ... are bona fide resident conversions." (Stats. 2002, ch. 1143, § 2.)

The County of Sonoma (County) enacted an ordinance with the professed aim of "implementing" the state conversion statutes. It imposed additional **[1275]** obligations upon a subdivider submitting a conversion application to those required by section 66427.5. The ordinance also imposed criteria that had to be satisfied by the subdivider before the application would be presumed bona fide and thus could be approved.

A mobilehome park operator brought suit to halt enforcement of the ordinance on the ground that it was preempted by section 66427.5. The trial court declined to issue a writ of mandate, concluding that the ordinance was not preempted. As will be shown, we conclude that the ordinance is expressly preempted because section 66427.5 states that the "scope of the hearing" for approval of the conversion application "shall be limited to the issue of compliance with this section." (*Id.*, subd. (e).) We further conclude that the ordinance is impliedly preempted because the Legislature, which has established a dominant role for the state in regulating mobilehomes, has indicated its intent to forestall local intrusion into the particular terrain of mobilehome conversions, declining to expand section 66427.5 in ways that would authorize local government to impose additional conditions or requirements for conversion approval. Moreover, the County's ordinance duplicates several features of state law, a redundancy that is an established litmus test for preemption. We therefore reverse the trial court's order and direct entry of a new order declaring the ordinance invalid.

BACKGROUND

On May 15, 2007, the County's board of supervisors unanimously enacted ordinance No. 5725 (the Ordinance). Sequoia Park Associates (Sequoia) is a limited partnership that owns and operates a mobilehome park it desires to subdivide and convert from a rental to a resident-owner basis. Within a month of the enactment of the Ordinance, Sequoia sought to have it overturned as preempted by section 66427.5. Specifically, Sequoia combined a petition for a writ of mandate with causes of action for declaratory and injunctive relief, and damages for inverse condemnation of its property.

The matter of the Ordinance's validity was submitted on the basis of voluminous papers addressing Sequoia's motion for issuance of a writ of mandate. The court heard argument and filed a brief order denying Sequoia relief. The court concluded that section 66427.5 "largely does appear ... by its own language" to impose limits on local authority to legislate on the subject of mobilehome conversions. "However, Ordinance 5725 seems merely to comply with, and give effect to, the requirements set forth in section 66427.5 rather than imposing additional requirements. This is certainly true for the language on bona fide conversions, tenant impact reports, and even **[1276]** general plan requirements. It is possibly less clear regarding health and safety, but even on this issue, the Ordinance does not appear to exceed [the County's] authority since, contrary to [Sequoia's] contention, it does not intrude on the [state Department of Housing and Community Development's] power in the area." This order is the subject of Sequoia's appeal. [1]

DISCUSSION

The parties agree that *HN1* our review of the trial court's order is de novo because it involves a pure issue of law, namely, whether the Ordinance is preempted by section 66427.5. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 132 [38 Cal. Rptr. 3d 575]; *Roble Vista Associates v. Bacon* (2002) 97 Cal.App.4th 335, 339 [118 Cal. Rptr. 2d 295].) But the parties do not agree on how far our analysis may, or should, extend.

Sequoia argues we should restrict our inquiry to the current version of section 66427.5, in particular paying no attention to an uncodified expression of the Legislature's intent passed at the same time that version was enacted. At the same time Sequoia also argues that we should look to a provision in a version of an amendment to the statute that the Legislature rejected in 2002.

The County's approach is similarly compressed: noting that because Sequoia challenged the legality of the Ordinance on its face, the County argues that our analysis must be confined to the four corners of that enactment, and nothing else. Yet the County ranges far afield in marshalling the statutes which it incorporates in its arguments, and tells us that section 66427.5 must be considered in the context of the "entire continuum of state regulation of mobilehome park subdivisions." And the County has no hesitation in arguing that the substance of the uncodified provision actually works to the County's benefit.
[1277]

Our view of our inquiry is that it is hardly as narrow as the parties believe. The authorities cited by the County involve situations where local ordinances were challenged on federal constitutional grounds

(e.g., *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [40 Cal. Rptr. 2d 402, 892 P.2d 1145] [vagueness]; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679-680 [51 Cal. Rptr. 3d 821] [equal protection]), not that they were preempted by state law. As for Sequoia's approach, it would appear feasible only if the state statute has language stating the unambiguous intent by the Legislature expressly forbidding cities and counties from acting.

CA(1) (1) But *HN2* for the great number of preemption issues—particularly if the emphasis is on implied preemption—the state and the local legislation must be considered together. Only by looking at both can a court know if the local law conflicts with, contradicts, or is inimical to the state law. As will now be shown, this is an established rule of preemption analysis.

Principles of Preemption

CA(2) (2) In California, preemption of local legislation by state law is a constitutional principle. *HN3* "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) The standards governing our inquiry are well established. According to our Supreme Court: *HN4* "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. [Citation.] We have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' [Citations.] 'The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another, then the presumption favors the validity of the local ordinance against an attack of state preemption.' [Citations.]

"Thus, when local government regulates in an area over which it traditionally has exercised control, such as ... particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute. [Citation.] The presumption against preemption accords with our more general understanding that 'it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.' [Citations.]
[1278]

CA(3) (3) "Moreover, *HN5* the 'general principles governing state statutory preemption of local land use regulation are well settled. ... "'Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates [citations], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citations].'" [Citation.]

"Local legislation is 'duplicative' of general law when it is coextensive therewith and 'contradictory' to general law when it is inimical thereto. Local legislation enters an area 'fully occupied' by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. [Citation.]" (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-1150 [45 Cal. Rptr. 3d 21, 136 P.3d 821], fn. omitted (*Big Creek*).)

There are three "recognized indicia of intent": "'(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that is has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898 [16 Cal. Rptr. 2d 215, 844 P.2d 534].)

HN6 *CA(4)* (4) "With respect to the *implied* occupation of an area of law by the Legislature's full and complete coverage of it, this court recently had this to say: '"Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme."' [Citation.] We went on to say: '"State regulation of a

subject may be so complete and detailed as to indicate an intent to preclude local regulation."' [Citation.] We thereafter observed: '"Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned."' [Citation.] When a local ordinance is identical to a state statute, it is clear that '"the field sought to be covered by the ordinance has already been occupied"' by state law. [Citation.]" (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068 [63 Cal. Rptr. 3d 67, 162 P.3d 583].)

HN7 *CA(5)* (5) To discern whether the local law has entered an area that has been "fully occupied" by state law according to the "recognized indicia of intent" requires an analysis that is based on an overview of the topic addressed by **[1279]** the two laws. "'In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole ... scope of the legislative scheme.'" (*Big Creek, supra*, 38 Cal.4th 1139, 1157, quoting *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 485 [204 Cal. Rptr. 897, 683 P.2d 1150]; accord, *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252, 1261 [23 Cal. Rptr. 3d 453, 104 P.3d 813]; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751 [29 Cal. Rptr. 2d 804, 872 P.2d 143].) Such an examination is made with the goal of "'detect[ing] a patterned approach to the subject'" (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707-708 [209 Cal. Rptr. 682, 693 P.2d 261], quoting *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 862 [76 Cal. Rptr. 642, 452 P.2d 930]), and whether the local law mandates what state law forbids, or forbids what state law mandates. (*Big Creek, supra*, 38 Cal.4th 1139, 1161; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866 [118 Cal. Rptr. 2d 746, 44 P.3d 120].)

Sequoia sees this as a case of express preemption, although it argues in the alternative that the Ordinance also falls to the concept of implied preemption. These contentions can only be evaluated with an appreciation of the sizable body of state legislation concerning mobilehome parks.

The Extent of State Law in the Area of Mobilehome Regulation

Section 66427.5 does not stand alone. If the Legislature ever did leave the field of mobilehome park legislation to local control, that day is long past.

Since 1979, the state has had the Mobilehome Residency Law, which comprises almost 100 statutes governing numerous aspects of the business of operating a mobilehome park. (Civ. Code, §§ 798 -799.10.) There are several provisions expressly ordering localities not to legislate in designated areas, such as the content of rental agreements (Civ. Code, § 798.17, subd. (a)(1)), and establishing specified exemptions from local rent control measures (Civ. Code, §§ 798.21, subd. (a), 798.45). [2] By this statutory scheme, the state has undertaken to "extensively regulate[] the landlord-tenant relationship between mobilehome park owners and residents." (*Greening v. Johnson* (1997) 53 Cal.App.4th 1223, 1226 [62 Cal. Rptr. 2d 214]; accord, *SC Manufactured Homes, Inc. v. Canyon View Estates, Inc.* (2007) 148 Cal.App.4th 663, 673 [56 Cal. Rptr. 3d 79]; *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 109 [3 Cal. Rptr. 3d 429].)
[1280]

Even earlier, in 1967, the state enacted the Mobilehome Parks Act (Health & Saf. Code, §§ 18200 -18700), which regulates the construction and installation of mobilehome parks in the state. (See *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483, 1489-1490 [26 Cal. Rptr. 3d 543].) In this act, the Legislature expressly stated that it "supersedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part." (Health & Saf. Code, § 18300, subd. (a).) The few exemptions from this prohibition are carefully delineated. [3]

Then there is the Manufactured Housing Act of 1980 (Health & Saf. Code, §§ 18000-18153), which regulates the sale, licensing, registration, and titling of mobilehomes. The Legislature declared that the provisions of this measure "apply to all parts of the state and supersede" any conflicting local ordinance. (Health & Saf. Code, § 18015.) The Department of Housing and Community Development (HCD) is in charge of enforcement. (Health & Saf. Code, §§ 18020, 18022, 18058.)
[1281]

These statutory schemes indicate that the state is clearly the dominant actor on this stage. Under the Mobilehome Parks Act, it is the HCD, a state agency, not localities, that was entrusted with the authority to formulate "specific requirements relating to construction, maintenance, occupancy, use, and design" of mobilehome parks (Health & Saf. Code, § 18253; see also Health & Saf. Code, §§ 18552 [HCD to adopt "building standards" and "other regulations for ... mobilehome accessory buildings or structures"], 18610 [HCD to "adopt regulations to govern the construction, use, occupancy, and maintenance of parks and lots within" mobilehome parks], 18620 [HCD to adopt "regulations regarding the construction of buildings in parks that it determines are reasonably necessary for the protection of life and property"], 18630 [plumbing], 18640 ["toilet, shower, and laundry facilities in parks"], 18670 ["electrical wiring, fixtures, and equipment ... that it determines are reasonably necessary for the protection of life and property"].)

At present, the HCD has promulgated hundreds of regulations that are collected in chapter 2 of division 1 of title 25 of the California Code of Regulations. (Cal. Code Regs., tit. 25, §§ 1000–1758.) The regulations exhaustively deal with a myriad of issues, such as "Electrical Requirements" (*id.*, §§ 1130 –1190), "Plumbing Requirements" (*id.*, §§ 1240–1284), "Fire Protection Standards" (*id.*, §§ 1300 –1319), "Permanent Buildings and Commercial Modulars" (*id.*, §§ 1380–1400), and "Accessory Buildings and Structures" (*id.*, §§ 1420–1520). The regulations even deal with pet waste (*id.*, § 1114) and the prohibition of cooking facilities in cabanas (*id.*, § 1462).

Once adopted, HCD regulations "shall apply to all parts of the state." (Health & Saf. Code, § 18300, subd. (a).) Mobilehomes can only be occupied or maintained when they conform to the regulations. (Health & Saf. Code, §§ 18550, 18871.) Enforcement is shared between the HCD and local governments (Health & Saf. Code, § 18300, subd. (f), 18400, subd. (a)), with HCD given the power to "evaluate the enforcement" by units of local government. (Health & Saf. Code, § 18306, subd. (a).) A locality may decline responsibility for enforcement, but if assumed and not actually performed, its enforcement power may be taken away by the HCD. (Health & Saf. Code, § 18300, subds. (b)–(e).) Local initiative is restricted to traditional police powers of zoning, setback, permit requirements, and regulating construction of utilities. (Gov. Code, § 65852.7; Health & Saf. Code, § 18300, subd. (g), quoted at fn. 3, *ante*.)

It is the state that determines which events and actions in the construction and operation of a mobilehome park require permits. (Health & Saf. Code, §§ 18500, 18500.5, 18500.6, 18505; Cal. Code Regs., tit. 25, §§ 1006.5, 1010, 1014, 1018, 1038, 1306, 1324, 1374.5.) Even if the locality issues the annual permit for a park to operate, a copy must be sent to the HCD. (Cal. **[1282]** Code Regs., tit. 25, §§ 1006.5, 1012.) It is the state that fixes the fees to be charged for these permits and certifications (Health & Saf. Code, §§ 18502, 18503; Cal. Code Regs., tit. 25, §§ 1008, 1020.4, 1020.7, 1025), and sets the penalties to be imposed for noncompliance (Health & Saf. Code, §§ 18504, 18700; Cal. Code Regs., tit. 25, §§ 1009, 1050, 1370.4). Sometimes, the state assumes exclusive responsibility for certain subjects, such as for earthquake-resistant bracing systems. (Cal. Code Regs., tit. 25, § 1370.4, subd. (a).)

Additional provisions respecting mobilehome parks are in the Government Code. Cities and counties cannot decide that a mobilehome park is not a permitted use "on all land planned and zoned for residential land use as designated by the applicable general plan," though the locality "may require a use permit." (Gov. Code, § 65852.7.) "[I]t is clear that the Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions [in Health and Safety Code section 18300, subdivision (g), quoted at footnote 3, *ante*] of where a mobilehome park may be located, vehicle parking, and lot lines, not the structures within the parks." (*County of Santa Cruz v. Waterhouse, supra*, 127 Cal.App.4th 1483, 1493 italics omitted.) A city or county must accept installation of mobilehomes manufactured in conformity with federal standards. (Gov. Code, § 65852.3, subd. (a).) Their power to impose rent control on mobilehome parks is restricted if the park qualifies as "new construction." (Gov. Code, § 65852.11, subd. (a); cf. text accompanying fn. 2, *ante*.)

This survey demonstrates that the state has a long-standing involvement with mobilehome regulation, the extent of which involvement is, by any standard, considerable. Having outlined the size of the state's regulatory footprint, it is now time to examine the details of section 66427.5 and the Ordinance.

Section 66427.5

Section 66427.5 is a fairly straightforward statute addressing the subject of how a subdivider shall demonstrate that a proposed mobilehome park conversion will avoid economic displacement of current tenants who do not choose to become purchasing residents. In its entirety it provides as follows:

HN84 "At the time of filing a tentative or parcel map for a subdivision to be created from the conversion of a rental mobilehome park to resident ownership, the subdivider shall avoid the economic displacement of all nonpurchasing residents in the following manner:
[1283]

"(a) The subdivider shall offer each existing tenant an option to either purchase his or her condominium or subdivided unit, which is to be created by the conversion of the park to resident ownership, or to continue residency as a tenant.

"(b) The subdivider shall file a report on the impact of the conversion upon residents of the mobilehome park to be converted to resident owned subdivided interest.

"(c) The subdivider shall make a copy of the report available to each resident of the mobilehome park at least 15 days prior to the hearing on the map by the advisory agency or, if there is no advisory agency, by the legislative body.

"(d)(1) The subdivider shall obtain a survey of support of residents of the mobilehome park for the proposed conversion.

"(2) The survey of support shall be conducted in accordance with an agreement between the subdivider and a resident homeowners' association, if any, that is independent of the subdivider or mobilehome park owner.

"(3) The survey shall be obtained pursuant to a written ballot.

"(4) The survey shall be conducted so that each occupied mobilehome space has one vote.

"(5) The results of the survey shall be submitted to the local agency upon the filing of the tentative or parcel map, to be considered as part of the subdivision map hearing prescribed by subdivision (e).

"(e) The subdivider shall be subject to a hearing by a legislative body or advisory agency, which is authorized by local ordinance to approve, conditionally approve, or disapprove the map. The scope of the hearing shall be limited to the issue of compliance with this section.

"(f) The subdivider shall be required to avoid the economic displacement of all nonpurchasing residents in accordance with the following:

"(1) As to nonpurchasing residents who are not lower income households, as defined by Section 50079.5 of the Health and Safety Code, the monthly rent, including any applicable fees or charges for use of any preconversion amenities, may increase from the preconversion rent to market levels, as defined in an appraisal conducted in accordance with nationally recognized professional appraisal standards, in equal annual increases over a four-year period.
[1284]

"(2) As to nonpurchasing residents who are lower income households, as defined by Section 50079.5 of the Health and Safety Code, the monthly rent, including any applicable fees or charges for use of any preconversion amenities, may increase from the preconversion rent by an amount equal to the average monthly increase in rent in the four years immediately preceding the conversion, except that in no event shall the monthly rent be increased by an amount greater than the average monthly percentage increase in the Consumer Price Index for the most recently reported period."

This is how section 66427.5 currently reads. But its antecedents are instructive.

The first version of section 66427.5, enacted in 1991, was no more than the first paragraph and subdivision (f) of the current version. (Stats. 1991, ch. 745, § 2, p. 3324.) The statute was substantially amended four years later with most of what is in the current version. The only significant variance is that the 1995 version did not contain what is now subdivision (d), specifying that the subdivider is to provide a survey of support. (Stats. 1995, ch. 256, § 5, p. 883.) The second version of

section 66427.5 was the one considered by the Court of Appeal in *El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal.App.4th 1153 [118 Cal. Rptr. 2d 15] (*El Dorado*).

At issue in *El Dorado* was a mobilehome park owner's application to convert its units from rental to resident owned. The renters opposed the conversion, "contending that they do not have enough information to decide whether to purchase or not, and the proposed conversion is merely a sham to avoid [Palm Springs's] rent control ordinance." (*El Dorado, supra*, 96 Cal.App.4th 1153, 1159.) The Palm Springs City Council approved the application, but made its approval subject to three conditions, requiring: "(1) the use of a 'Map Act Rent Date,' defined as the date of the close of escrow of not less than 120 lots; (2) the use of a sale price established by a specified appraisal firm, the appraisal costs to be paid by [the owner-subdivider]; and (3) financial assistance to all residents in the park to facilitate their purchase of the lots underlying their mobilehomes." (*Id.* at p. 1157.)

The trial court denied the park owner's petition for a writ of administrative mandamus. The owner appealed, contending "that its application for subdivision is governed by section 66427.5. It relies on subdivision (d) [now subd. (e)] of that section, which states, in part, that the scope of the City Council's hearing is limited to the issue of compliance with the requirements of that section." (*El Dorado, supra*, 96 Cal.App.4th 1153, **[1285]** 1157–1158.) Palm Springs took the position that the conditions were authorized by Government Code section 66427.4, subdivision (c), [4] which authorized the city council to "'require the subdivider to take steps to mitigate any adverse impact of the conversion on the ability of displaced mobilehome park residents to find adequate space in a mobilehome park.'" (96 Cal.App.4th at p. 1158.)

The Court of Appeal agreed with the owner and reversed. It rejected Palm Springs's argument about section 66427.4, [5] concluding that it applied only when the mobilehome park is being converted to another use: "[I]t would not apply to conversion of a mobilehome park when the property's use as a mobilehome park is unchanged. The section would only apply if the mobilehome park was being converted to a shopping center or another different use of the property. In that situation, there would be 'displaced mobilehome park residents' who would need to find 'adequate space in a mobilehome park' for their mobilehomes and themselves." (*El Dorado, supra*, 96 Cal.App.4th 1153, 1161.) The court also held the language of subdivision (e) of section 66427.4 dispositive on this point. (96 Cal.App.4th at pp. 1161–1163.)

CA(6) (6) But, and as particularly apt here, the court sustained the park owner's argument about section 66427.5, subdivision (d), concluding that ***HN9*** under it the city council "only had the power to determine if [the subdivider] had complied with the requirements of the section." (*El Dorado, supra*, 96 Cal.App.4th 1153, 1163–1164.) Although the court did appear concerned that the conversion process might be used for improper purposes—such as the bogus purchase of a single unit by the subdivider/owner to avoid local rent control—it believed the language of section 66427.5, subdivision (d), did not allow such considerations to be taken into account: "[T]he City lacks **[1286]** authority to investigate or impose additional conditions to prevent sham or fraudulent transactions at the time it approves the tentative or parcel map. Although the lack of such authority may be a legislative oversight, and although it might be desirable for the Legislature to broaden the City's authority, it has not done so. We therefore agree with appellant that the argument that the Legislature should have done more to prevent partial conversions or sham transactions is a legislative issue, not a legal one." [6] (96 Cal.App.4th at p. 1165.) And, the court later noted, "there is no evidence that [the owner's] filing of an application for approval of a tentative parcel map is not the beginning of a bona fide conversion to resident ownership ... .? (*Id.* at p. 1174, fn. 17.)

CA(7) (7) One other point of *El Dorado* is significant. ***HN10*** The court specifically rejected arguments that would require a numerical threshold before a conversion could proceed, there being no statutory support for the claim that conversion only occurred if more than 50 percent of the lots have been sold before a tentative or parcel map is filed. (*El Dorado, supra*, 96 Cal.App.4th 1153, 1172–1173.) The court refused to require a subdivider to demonstrate that the proposed subdivision has the support of a majority of existing residents—fixed at either one-half or two-thirds—thus satisfying the local authority that this was not a "forced conversion." [7] (96 Cal.App.4th at pp. 1181–1182.) The court concluded: "The legislative intent to encourage **[1287]** conversion of mobilehome parks to resident ownership would not be served by a requirement that a conversion could only be made with resident consent." (*Id.* at p. 1182.)

Following *El Dorado*, the continuing problem of mobilehome park conversion, and the phrase "bona fide," again engaged the Legislature's attention. That same year the Legislature amended section 66427.5 by adding what is now subdivision (d) and the requirement of a "survey of support of residents" whose results were to be filed with the tentative or parcel map. As it did so, the Legislature enacted the following language, but did not include it as part of section 66427.5: "It is the intent of the Legislature to address the conversion of a mobilehome park to resident ownership that is not a bona fide resident conversion, as described by the Court of Appeal in El Dorado Palm Springs, Ltd. v. City of Palm Springs[, *supra*,] 96 Cal.App.4th 1153. The court in this case concluded that the subdivision map approval process specified in Section 66427.5 of the Government Code may not provide local agencies with the authority to prevent nonbona fide resident conversions. The court explained how a conversion of a mobilehome park to resident ownership could occur without the support of the residents and result in economic displacement. It is, therefore, the intent of the Legislature in enacting this act to ensure that conversions pursuant to Section 66427.5 of the Government Code are bona fide resident conversions." (Stats. 2002, ch. 1143, § 2.) [8]

The Ordinance

The Ordinance has eight sections, but only three—sections I, II, and III—are pertinent to this appeal. [9] **[1288]**

Section I declares the purposes of the Ordinance. It opens with the supervisors' finding that "the adoption of this Ordinance is necessary and appropriate to implement certain policies and programs set forth within the adopted General Plan Housing Element, and to comply with state laws related to the conversion of mobile home parks to resident ownership." Specific purposes included: (1) "To implement state laws with regard to the conversion of mobile home parks to resident ownership"; (2) "To ensure that conversions of mobile home parks to resident ownership are bona fide resident conversions in accordance with state law"; (3) "To implement the goals and policies of the General Plan Housing Element"; (4) "To balance the need for increased homeownership opportunities with the need to protect existing rental housing opportunities"; (5) "To provide adequate disclosure to decision-makers and to prospective buyers prior to conversion of mobile home parks to resident ownership"; (6) "To ensure the public health and safety in converted parks"; and (7) "To conserve the County's affordable housing stock."

Section II deals with the "Applicability" of the Ordinance by declaring that "These provisions apply to all conversions of mobile home parks to resident ownership, except those conversions for which mapping requirements have been waived pursuant to Government Code [Section] 66428.1 These provisions do not apply to the conversion of a mobile home park to an alternate use, which conversions are regulated by Government Code Sections 65863.7 and 66427.4, and by Section 26-92-090 of Chapter 26 of the Sonoma County Code."

Section III opens by providing several definitions of terms used in the Ordinance and in chapter 25 of the Sonoma County Code.

"**Mobile Home Park Conversion to Resident Ownership** means the conversion of a mobile home park composed of rental spaces to a condominium or common interest development, as described in and/or regulated by Government Code Sections 66427.5 and/or 66428.1."

"**Mobile Home Park Closure, Conversion or Change of Use** means changing the use of a mobile home park such that it no longer contains occupied mobile or manufactured homes, as described in and regulated by Government Code Section 66427.4.' "

"**Subdivision**[] means the division of any improved or unimproved land, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, financing, conveyance, transfer or any other purpose, whether immediate or future. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility **[1289]** easement or railroad rights-of-way. Subdivision includes a condominium project or common interest development, as defined in Section 1351 of the Civil Code or a community apartment project, as defined in Section 11004 of the Business and Professions Code. Any conveyance of land to a governmental agency, public

entity or public utility shall not be considered a division of land for purposes of computing the number of parcels.' "

The heart of the Ordinance is subdivision (d) of Section III, which adds "a new Article IIIB" to chapter 25 of the Sonoma County Code. Because of its importance, we quote it in full:

"Article IIIB. Mobile Home Park Conversions to Resident Ownership.

"25-39.7 (a) Applicability. The provisions of this Article IIIB shall apply to all conversions of mobile home parks to resident ownership except those conversions for which mapping requirements have been waived pursuant to Government Code § 66428.1.

"25-39.7 (b) Application Materials Required.

"(1) In addition to any other information required by this Code and/or other applicable law, the following information is required at the time of filing of an application for conversion of a mobile home park to resident ownership:

"a) A survey of resident support conducted in compliance with subdivision (d) of Government Code Section 66427.5 The subdivider shall demonstrate that the survey was conducted in accordance with an agreement between the subdivider and an independent resident homeowners association, if any, was obtained pursuant to a written ballot, and was conducted so that each occupied mobile home space had one vote. The completed survey of resident support ballots shall be submitted with the application. In the event that more than one resident homeowners association purports to represent residents in the park, the agreement shall be with the resident homeowners association which represent the greatest number of resident homeowners in the park.

"b) A report on the impact of the proposed conversion on residents of the mobile home park. The tenant impact report shall, at a minimum include all of the following:

"i) Identification of the number of mobile home spaces in the park and the rental rate history for each such space over the four years prior to the filing of the application;
[1290]

"ii) Identification of the anticipated method and timetable for compliance with Government Code Section 66427.5 (a), and, to the extent available, identification of the number of existing tenant households expected to purchase their units within the first four (4) years after conversion;

"iii) Identification of the method and anticipated time table for determining the rents for non-purchasing residents pursuant to Government Code Section 66427.5 (f)(1), and, to the extent available, identification of the number of tenant households likely to be subject to these provisions;

"iv) Identification of the method for determining and enforcing the controlled rents for non-purchasing households pursuant to Government Code Section 66427.5 (f)(2), and, to the extent available, identification of the number of tenant households likely to be subject to these provisions;

"v) Identification of the potential for non-purchasing residents to relocate their homes to other mobile home parks within Sonoma County, including the availability of sites and the estimated cost of home relocation;

"vi) An engineer's report on the type, size, current condition, adequacy, and remaining useful life of common facilities located within the park, including but not limited to water systems, sanitary sewer, fire protection, storm water, streets, lighting, pools, playgrounds, community buildings and the like. A pest report shall be included for all common buildings and structures. 'Engineer' means a registered civil or structural engineer, or a licensed general engineering contractor;

"vii) If the useful life of any of the common facilities or infrastructure is less than thirty (30) years, a study estimating the cost of replacing such facilities over their useful life, and the subdivider's plan to provide funding for the same;

"viii) An estimate of the annual overhead and operating costs of maintaining the park, its common areas and landscaping, including replacement costs as necessary, over the next thirty (30) years, and the subdivider's plan to provide funding for same.

"ix) Name and address of each resident, and household size.

"x) An estimate of the number of residents in the park who are seniors or disabled. An explanation of how the estimate was derived must be included.

"(c) A maintenance inspection report conducted on site by a qualified inspector within the previous twelve (12) calendar months demonstrating **[1291]** compliance with Title 25 of the California Code of Regulations ('Title 25 Report'). Proof of remediation of any Title 25 violations shall be confirmed in writing by the California Department of Housing and Community Development (HCD).

"25-39.7 (c) Criteria for Approval of Conversion Application.

"(1) An application for the conversion of a mobile home park to resident ownership shall be approved only if the decision maker finds that:

"a) A survey of resident support has been conducted and the results filed with the Department in accordance with the requirements of Government Code Section 66427.5 and this Chapter;

"b) A tenant impact report has been completed and filed with the Department in accordance with the requirements of Government Code Section 66427.5 and this Chapter;

"c) The conversion to resident ownership is consistent with the General Plan, any applicable Specific or Area Plan, and the provisions of Chapter 26 of the Sonoma County Code;

"d) The conversion is a bona-fide resident conversion;

"e) Appropriate provision has been made for the establishment and funding of an association or corporation adequate to ensure proper long-term management and maintenance of all common facilities and infrastructure; and

"f) There are no conditions existing in the mobile home park that are detrimental to public health or safety, provided, however, that if any such conditions exist, the application for conversion may be approved if: (1) all of the findings required under subsections (a) through (e) are made and (2) the subdivider has instituted corrective measures adequate to ensure prompt and continuing protection of the health and safety of park residents and the general public.

"(2) For purposes of determining whether a proposed conversion is a bona-fide resident conversion, the following criteria shall be used:

"a) Where the survey of resident support conducted in accordance with Government Code Section 66427.5 and with this Chapter shows that more than 50% of resident households support the conversion to resident ownership, the conversion shall be presumed to be a bona-fide resident conversion.
[1292]

"b) Where the survey of resident support conducted in accordance with Government Code Section 66427.5 and with this Chapter shows that at least 20% but not more than 50% of residents support the conversion to resident ownership, the subdivider shall have the burden of demonstrating that the proposed conversion is a bona-fide resident conversion. In such cases, the subdivider shall demonstrate, at a minimum, that a viable plan, with a reasonable likelihood of success as determined by the decision-maker, is in place to convey the majority of the lots to current residents of the park within a reasonable period of time.

"c) Where the survey of support conducted in accordance with Government Code Section 66427.5 and with this Chapter shows that less than 20% of residents support the conversion to resident ownership, the conversion shall be presumed not to be a bona-fide resident conversion.

"25-39.7 (d) Tenant Notification. The following tenant notifications are required:

"(1) Tenant Impact Report. The subdivider shall give each resident household a copy of the impact report required by Government Code Section 66427.5 (b) within fifteen days after completion of such report, but in no case less than fifteen (15) days prior to the public hearing on the application for conversion. The subdivider shall also provide a copy of the report to any new or prospective residents following the original distribution of the report.

"(2) Exclusive Right to Purchase. If the application for conversion is approved, the subdivider shall give each resident household written notice of its exclusive right to contract for the purchase of the dwelling unit of space it occupies at the same or more favorable terms and conditions than those on which such unit or space shall be initially offered to the general public. The right shall run for a period of not less than ninety (90) days from the issuance of the subdivision public report ('white paper') pursuant to California Business and Professions Code § 11018.2, unless the subdivider received prior written notice of the resident's intention not to exercise such right.

"(3) Right to Continue Residency as Tenant. If the application for conversion is approved, the subdivider shall give each resident household written notice of its right to continue residency as a tenant in the park as required by Government Code § 66427.5 (a)."

The Ordinance Is Expressly Preempted by Section 66427.5

CA(8) (8) It is a given that *HN11* regulation of the uses of land within its territorial jurisdiction is one of the traditional powers of local government. (E.g., *Big [1293] Creek, supra*, 38 Cal.4th 1139, 1151; *IT Corp. v. Solano County Board of Supervisors* (1991) 1 Cal.4th 81, 85, 95, 99 [2 Cal. Rptr. 2d 513, 820 P.2d 1023]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 376 [85 Cal. Rptr. 2d 28].) We are also mindful that our Supreme Court has twice held, prior to enactment of section 66427.5, that the Subdivision Map Act did not preempt local authority to regulate residential condominium conversions. (*Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 262–266 [217 Cal. Rptr. 1, 703 P.2d 339]; *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 868–869 [201 Cal. Rptr. 593, 679 P.2d 27].) Given the presumption against preemption (*Big Creek, supra*, 38 Cal.4th 1139, 1149), we start by assuming that the Ordinance is valid.

However, this attitude does not long survive. The survey of state legislation already undertaken demonstrates that the state has taken for itself the commanding voice in mobilehome regulation. Localities are allowed little scope to improvise or deviate from the Legislature's script. The state's dominance was in place before the subject of mobilehome park conversion was introduced into the Subdivision Map Act in 1991. (See Stats. 1991, ch. 745, §§ 1–2, 4, pp. 3323, 3324, 3325, adding §§ 66427.5, 66428.1 & amending § 66427.4 to cover mobilehome park conversions.) This was seven years after the state had declared itself in favor of converting mobilehome parks to resident ownership, and at the same time established the Mobilehome Park Purchase Fund from which the HCD could make loans to low-income residents and resident organizations to facilitate conversions. (Stats. 1984, ch. 1692, § 2, p. 6114, adding Health & Saf. Code, §§ 50780–50786.)

Although the Court of Appeal in *El Dorado* did not explicitly hold that section 66427.5 was an instance of express preemption, that is clearly how it read the statute. And although there is nothing in the text of section 66427.5 that at first glance looks unambiguously like a stay-away order from the Legislature to cities and counties, [10] there is no doubt that the *El Dorado* court construed the operative language as precluding addition by cities or counties. That operative language reads: "The subdivider shall be subject to a hearing by a legislative body or advisory agency, which is authorized by local ordinance to approve, conditionally approve, or disapprove the [tentative or parcel] map. *The scope of the hearing shall be limited to the issue of compliance with this section.*" (§ 66427.5, subd. (e), italics added.) The **[1294]** italicized language is, in its own way, comprehensive. But the contrasting constructions the parties give it could not be more starkly divergent.

According to Sequoia, section 66427.5 has an almost ministerial operation. The words of the statute "communicate unambiguously that local agencies must approve a mobilehome park subdivision map if the applicant complies with 'this section' alone." The County and supporting amici curiae argue that section 66427.5 and *El Dorado* are not dispositive here. Indeed, they almost argue that the statute and the decision are not relevant. As they see it, section 66427.5—both before and after *El Dorado*—is a

statute of very modest scope, addressing itself only to the issue of avoiding and mitigating the economic displacement of residents who will not be purchasing units when the mobilehome park is converted. All the Ordinance does, they maintain, is "implement" and flesh out the details of the Legislature's directive in a wholly appropriate fashion, leaving unimpaired the traditional local authority over land uses. As the amici curiae state it: "Ordinance No. 5725 does not purport to impose any additional economic restrictions to preserve affordability or to avoid displacement."

We admit that there is no little attraction to the County's approach. Beginning with the presumption against preemption in the area of land use, it is more than a little difficult to see the Legislature as accepting that approval of a conversion plan is dependent only on the issues of resident support and the subdivider's efforts at avoiding economic displacement of nonpurchasing residents. Section 66427.5 does employ language that seems to accept, if not invite, supplementary local action. [11] For example, a subdivider is required to "file a report on the impact of the conversion upon residents" (§ 66427.5, subd. (b)), but the Legislature made no effort to spell out the contents of such a report. And there is some force to the rhetorical inquiry posed by amici curiae: "Surely, the Legislature intended that the report have substantive content ... . [¶] ... [¶] If there can be no assurance as to the contents of the [report], it may become a meaningless exercise."

However, a careful examination of the relevant statutes extracts much of the appeal in the County's approach. There are three such statutes—sections 66427.4, 66427.5, and 66428.1. And if they are considered as a unit—which **[1295]** they are, as the three mobilehome conversion statutes in the Subdivision Map Act [12]—a coherent logic begins to emerge.

It must be recalled that the predicate of the statutory examination is a functioning park with existing tenants with all necessary permits and inspections needed for current operation. As Sequoia points out: "Mobilehome parks being converted under section 66427.5 have already been mapped out, plotted out, approved under zoning and general plans, and subjected to applicable health and safety regulations." Moreover, the park has been inspected and relicensed on an annual basis. But the owner has decided to change. If the change is to close the park and devote the land to a different use, section 66427.4 governs. If the change is a more modest switch to residential conversion, sections 66427.5 and 66428.1 are applicable.

These statutes form a rough continuum. If the owner is planning a new use, that is, leaving the business of operating a mobilehome park, section 66427.4 (quoted in full at fn. 5, *ante*) directs the owner to prepare a report on the impact of the change to tenants or residents. (§ 66427.4, subd. (a).) The relevant local authority "may require the subdivider to take steps to mitigate any adverse impact of the conversion on the ability of displaced mobilehome park residents to find adequate space in a mobilehome park" as a condition of approving or conditionally approving the change. (*Id.*, subd. (c).) But in this situation—where the land use question is essentially reopened de novo—section 66427.4 explicitly authorizes local input: "This section establishes *a minimum standard for local regulation* of conversions of mobilehome parks into other uses *and shall not prevent a local agency from enacting more stringent measures.*" (*Id.*, subd. (d), italics added.)

At the other end of the continuum is the situation covered by section 66428.1, subdivision (a), which provides: "When at least two-thirds of the owners of mobilehomes who are tenants in the mobilehome park sign a petition indicating their intent to purchase the mobilehome park for purposes of converting it to resident ownership, and a field survey is performed, the requirement for a parcel map or a tentative and final map shall be waived unless any of the following conditions exist: [¶] (1) There are design or improvement requirements necessitated by significant health or safety concerns. [¶] (2) The local agency determines that there is an exterior boundary discrepancy that requires recordation of a new parcel or tentative and final map. [¶] (3) The existing parcels which exist prior to the proposed conversion **[1296]** were not created by a recorded parcel or final map. [¶] (4) The conversion would result in the creation of more condominium units or interests than the number of tenant lots or spaces that exist prior to conversion."

So, if the conversion essentially maintains an acceptable status quo, the conversion is approved by operation of law. And the locality has no opportunity or power to stop it, or impose conditions for its continued operation.

Section 66427.5 occupies the midway point on the continuum. It deals with the situation where the mobilehome park will continue to operate as such, merely transitioning from a rental to an ownership basis, and there is not two-thirds tenant support for the change—in other words, conversions that enjoy a level of tenant concurrence that does not activate the free ride authorized by section 66428.1. In those situations, the local authority enjoys less power than granted by section 66427.4, but more than conversions governed by 66428.1. It is not surprising that in this middle situation, the Legislature would see fit to grant local authorities some power, but circumscribe the extent of that power. That is what section 66427.5 does. It says in effect: Local authority, you have this power, but no more.

As previously mentioned, the Legislature amended section 66427.5 in the wake of *El Dorado*. Two features of that amendment are notable. First, the Legislature added what is now the requirement in subdivision (d) of a survey of tenant support for the conversion, when the level of that support does not reach the two-thirds mark at which point section 66428.1 kicks in. But the Legislature did not address the point noted in *El Dorado* that there is no minimum amount of tenant support required for a conversion to be approved. (See *El Dorado, supra*, 96 Cal.App.4th 1153, 1172–1173.) As this was the only addition to the statute, it follows that it was deemed sufficient to address the problem of "bona fide" conversions mentioned in the unmodified portion of the enactment that accompanied the amendment.

CA(9) (9) Second, and even more significant for our purposes, the *El Dorado* court expressly read section 66427.5 as not permitting a local authority to inject any other consideration into its decision whether to approve a subdivision conversion. [12] (*El Dorado, supra*, 96 Cal.App.4th 1153, 1163–1164, 1166, **[1297]** 1182.) And when it amended section 66427.5, the Legislature did nothing to overturn the *El Dorado* court's reading of the extent of local power to step beyond the four corners of that statute. This is particularly telling: ***HN12*** "'[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.'" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156 [278 Cal. Rptr. 614, 805 P.2d 873], quoting *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 [180 Cal. Rptr. 496, 640 P.2d 115]; accord, *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 [135 Cal. Rptr. 2d 602, 70 P.3d 1023]; *People v. Ledesma* (1997) 16 Cal.4th 90, 100–101 [65 Cal. Rptr. 2d 610, 939 P.2d 1310].)

CA(10) (10) The foregoing analysis convinces us that the *El Dorado* construction of section 66427.5 has stood the test of time and received the tacit approval of the Legislature. We therefore conclude that what is currently ***HN13*** subdivision (e) of section 66427.5 continues to have the effect of an express preemption of the power of local authorities to inject other factors when considering an application to convert an existing mobilehome park from a rental to a resident-owner basis.

The Ordinance Is Impliedly Preempted

As previously shown, local law is invalid if it enters a field fully occupied by state law, or if it duplicates, contradicts, or is inimical, to state law. (*O'Connell v. City of Stockton, supra*, 41 Cal.4th 1061, 1068; *Big Creek, supra*, 38 Cal.4th 1139, 1150.) The three tests for implied preemption are: (1) the issue has been so completely covered by state law as to indicate that the issue is now exclusively a state concern; (2) the issue has been only partially covered by state law, but the language of the state law indicates that the state interest will not tolerate additional local input; and (3) the issue has been only partially covered by state law, but the negative impact of local legislation on the state interest is greater than whatever local benefits derive from the local legislation. (*O'Connell v. City of Stockton, supra*, at p. 1068; *Morehart v. County of Santa Barbara, supra*, 7 Cal.4th 725, 751; *People ex rel. Deukmejian v. County of Mendocino, supra*, 36 Cal.3d 476, 485.) We conclude that the County's Ordinance is also vulnerable to two of the tests for implied preemption.
[1298]

The overview of the regulatory schemes touching mobilehomes undertaken earlier in this opinion demonstrates that the state's involvement is extensive and comprehensive. Grants of power to cities and counties are few in number, guarded in language, and invariably qualified in scope. Nevertheless, those grants do exist. Section 66427.5 shows that the state is willing to allow some local participation in some aspects of mobilehome conversion; and section 66427.4 shows that in one setting—when a

mobilehome park is converted to a different use—it is virtually expected that the state role will be secondary. The first test for implied preemption cannot be established.

But the three-statute continuum discussed earlier in connection with express preemption also shows that the second and third tests for implied preemption are.

For 25 years, the state has had the policy "to encourage and facilitate the conversion of mobilehome parks to resident ownership." (Health & Saf. Code, § 50780, subd. (b).) The state is even willing to use public dollars to promote this policy. (Health & Saf. Code, § 50782 [establishing the Mobilehome Park Purchase Fund].) The state clearly has an interest in mobilehome park conversions, but is willing to have local governments occupy some role in the process. The extent of local involvement is calibrated to the situation. However, when the subject is narrowed to conversions that merely affect the change from rental to residential ownership, local involvement is strictly limited. If the proposed conversion has the support of two-thirds or more of the park tenants, section 66428.1 prevents the city or county from interfering except in four very specific situations. If the tenant support is less than two-thirds, section 66427.5 directs that the role of local government "shall be limited to the issue of compliance with this section." (§ 66427.5, subd. (e).)

In sum, the fact that the situations where localities could involve themselves in conversions have been so carefully delineated shows that the Legislature viewed the subject as one where the state concern would not be advanced if parochial interests were allowed to intrude. Accordingly, we conclude that the second and third tests for implied preemption are present.

There is more. "Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates ... general law ... ." (*Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807–808 [100 Cal. Rptr. 609, 494 P.2d 681], citations omitted; accord, *Big Creek, supra*, 38 Cal.4th 1139, 1150; *Morehart v. County of Santa Barbara, supra*, 7 Cal.4th 725, 747.) The Ordinance is plainly duplicative of section 66427.5 in several respects, as the County candidly admits: the Ordinance "sets forth minimum ... requirements" for the conversion application, "including: (a) submission of a survey of resident support *in compliance with section 66427.5*; (b) submission of a **[1299]** report on the impact of the proposed conversion on park residents *as required by section 66427.5*; and (c) submission of a copy of the annual maintenance inspection report *already required by Title 25 of the California Code of Regulations*." (Italics added.) The Ordinance also purports to require the subdivider to provide residents of the park "written notice of [the] right to continue residency as a tenant in the park as required by Government Code Section 66427.5(a)" and "a copy of the impact report required by Government Code Section 66427.5(b)." (Sonoma County Code, § 25-39.7(d), subd. (3), (1).)

And still more. A local ordinance is impliedly preempted if it mandates what state law forbids. (*Big Creek, supra*, 38 Cal.4th 1139, 1161; *Great Western Shows, Inc. v. County of Los Angeles, supra*, 27 Cal.4th 853, 866.) As already established, section 66427.5 strictly prohibits localities from deviating from the state-mandated criteria for approving a mobilehome park conversion application. Yet the Ordinance directs that the application shall be approved "only if the decision maker finds that," in addition to satisfying the survey and tenant impact report requirements imposed by section 66427.5, the application (1) "is consistent with the general plan" and other local land and zoning use regulations; (2) demonstrates that "appropriate" financial provision has been made to underwrite and "ensure proper long-term management and maintenance of all common facilities and infrastructure"; (3) the applicant shows that there are "no conditions existing in the mobile home park that are detrimental to public health or safety"; and (4) the proposed conversion "is a bona-fide resident conversion" as measured against the percentage-based presumptions established by the Ordinance. [14] (Sonoma County Code, § 25.39-7(c), subds. (1)(c)–(f), (2).) The Ordinance also requires that, following approval of the conversion application, the subdivider "shall give each resident household written notice of its exclusive right to contract for the purchase of the dwelling unit or space it occupies at the same or more favorable terms and conditions than those on which such unit or space shall be initially offered to the general public," for a period of 90 days "from the issuance of the subdivision public report ... pursuant to California Business and Professions Code Section 11018.2." (*Id.*, § 25-39.7(d), subd. (2).)

However commendable or well intentioned these additions may be, they are improper additions to the exclusive statutory requirements of section 66427.5. The matter of just what constitutes a "bona fide conversion" **[1300]** according to the Ordinance appears to authorize—if not actually invite—a purely subjective inquiry, one which is not truly reduced by reference to the Ordinance's presumptions. [15]

And although the Ordinance employs the mandatory "shall," it does not establish whether the presumptions are conclusive or merely rebuttable. This uncertainty is only compounded when other criteria are scrutinized. What is the financial provision that will be deemed "appropriate" to "ensure proper long-term management and maintenance"? Such imprecision stands in stark contrast with the clear directives in section 66427.5.

The County, ably supported by an impressive array of amici curiae, stoutly defends its corner with a number of arguments as to why the Ordinance should be allowed to operate. The County lays particular emphasis on the need for ensuring that the conversion must comport with the general plan, especially its housing element, because that is where the economic dislocation will be manifest, by reducing the inventory of low-cost housing. (See Health & Saf. Code, § 50780, subd. (a)(1), (3).) In this sense, however, section 66427.5 has a broader reach than the County perhaps appreciates, as it does make provision in subdivision (f) for helping nonpurchasing lower income households to remain. In any event, we cannot read section 66427.5 as granting localities the same powers expressly enumerated in section 66427.4 that are so conspicuously absent from the plain language of section 66427.5.

CA(11) (11) We assume the County was motivated by the laudable purposes stated in the first section of the Ordinance. And we have acknowledged that the County's construction of section 66427.5 can find some plausibility from the statutory language. Nevertheless, and after a most careful consideration of the arguments presented, we have concluded that the Ordinance crosses the line established by the Legislature as marking territory reserved for the state. As we recently stated in a different statutory context: "There are weighty arguments and worthy goals arrayed on each side ... [and] . . issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court." (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 324 [76 Cal. Rptr. 3d 507].) Of course, if the Legislature disagrees with our conclusion, or if it wishes to grant cities and counties a greater measure of power, it can amend the language of section 66427.5.
[1301]

DISPOSITION

The order is reversed, and the cause is remanded to the trial court with directions to enter a new order or judgment consistent with this opinion. Sequoia shall recover its costs.

Haerle, Acting P. J., and Lambden, J., concurred.

A petition for a rehearing was denied September 10, 2009, and respondent's petition for review by the Supreme Court was denied December 2, 2009, S176718.

Footnote *

Pursuant to California Constitution, article VI, section 21.

Footnote 1

It is typical of the generally high quality of the briefing that the experienced appellate counsel for Sequoia does not treat the requirement of California Rules of Court, rule 8.204(a)(2)—which directs that the appellant "explain why the order appealed from is appealable"—as satisfied with a ministerial recital of boilerplate language. He devotes more than two full pages of his opening brief to a discussion establishing that, according to *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1097-1098 [53 Cal. Rptr. 3d 402], "Although the [trial court's] order was couched as a denial of the mandate petition alone, its effect was a dismissal of Sequoia's entire action," and thus appealable as a final judgment. He also puts forward a fallback position, based on an obvious knowledge of this court, that, if necessary, we "could also amend the order below as this division did in similar circumstances in *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 766, fn. 13 [120 Cal. Rptr. 2d 550], to specify the trial court's intent to dispose of the remaining causes of action." We conclude there is no need to amend the order because counsel's initial explanation is sound, and concurred in by the County. We mention this to note that this is the sort of attention to jurisdictional issues we would like to see, but seldom do.

Footnote 2

The Mobilehome Residency Law has been construed as not otherwise preempting or precluding adoption of residential rent control. (See Civ. Code, § 1954.25; *Cacho v. Boudreau* (2007) 40 Cal.4th 341, 350 [53 Cal. Rptr. 3d 43, 149 P.3d 473], and decisions cited.)

Footnote 3

"This part shall not prevent local authorities of any city, county, or city and county, within the reasonable exercise of their police powers, from doing any of the following:

"(1) From establishing, subject to the requirements of Sections 65852.3 and 65852.7 of the Government Code, certain zones for manufactured homes, mobilehomes, and mobilehome parks within the city, county, or city and county, or establishing types of uses and locations, including family mobilehome parks, senior mobilehome parks, mobilehome condominiums, mobilehome subdivisions, or mobilehome planned unit developments within the city, county, or city and county, as defined in the zoning ordinance, or from adopting rules and regulations by ordinance or resolution prescribing park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking or from prescribing the prohibition of certain uses for mobilehome parks.

"(2) From regulating the construction and use of equipment and facilities located outside of a manufactured home or mobilehome used to supply gas, water, or electricity thereto, except facilities owned, operated, and maintained by a public utility, or to dispose of sewage or other waste therefrom when the facilities are located outside a park for which a permit is required by this part or the regulations adopted pursuant thereto.

"(3) From requiring a permit to use a manufactured home or mobilehome outside a park for which a permit is required by this part or by regulations adopted pursuant thereto, and require a fee therefor by local ordinance commensurate with the cost of enforcing this part and local ordinance with reference to the use of manufactured homes and mobilehomes, which permit may be refused or revoked if the use violates this part or Part 2 (commencing with Section 18000), any regulations adopted pursuant thereto, or any local ordinance applicable to that use.

"(4) From requiring a local building permit to construct an accessory structure for a manufactured home or mobilehome when the manufactured home or mobilehome is located outside a mobilehome park, under circumstances when this part or Part 2 (commencing with Section 18000) and the regulations adopted pursuant thereto do not require the issuance of a permit therefor by the department [i.e., the state Department of Housing and Community Development].

"(5) From prescribing and enforcing setback and separation requirements governing the installation of a manufactured home, mobilehome, or mobilehome accessory structure or building installed outside of a mobilehome park." (Health & Saf. Code, § 18300, subd. (g).)

Footnote 4

Subsequent statutory references are to the Government Code unless otherwise indicated.

Footnote 5

At all relevant times, section 66427.4 has provided:

"(a) At the time of filing a tentative or parcel map for a subdivision to be created from the conversion of a mobilehome park to another use, the subdivider shall also file a report on the impact of the conversion upon the displaced residents of the mobilehome park to be converted. In determining the

impact of the conversion on displaced mobilehome park residents, the report shall address the availability of adequate replacement space in mobilehome parks.

"(b) The subdivider shall make a copy of the report available to each resident of the mobilehome park at least 15 days prior to the hearing on the map by the advisory agency or, if there is no advisory agency, by the legislative body.

"(c) The legislative body, or an advisory agency which is authorized by local ordinance to approve, conditionally approve, or disapprove the map, may require the subdivider to take steps to mitigate any adverse impact of the conversion on the ability of displaced mobilehome park residents to find adequate space in a mobilehome park.

"(d) This section establishes a minimum standard for local legislation of conversions of mobilehome parks into other uses and shall not prevent a local agency from enacting more stringent measures.

"(e) This section shall not be applicable to a subdivision which is created from the conversion of a rental mobilehome park to resident ownership."

Footnote 6

Nevertheless, the *El Dorado* court did seem to indicate that there was an available remedy for Palm Springs's fears concerning evasion of its rent control ordinance. Although local authorities could not themselves use section 66427.5 to halt "sham or failed transactions in which a single unit is sold, but no others" (*El Dorado, supra*, 96 Cal.App.4th at 1153, 1166, fn. 10), there was no such restriction on the judiciary. "[T]he courts will not apply section 66427.5 to sham or failed transactions" (*id.* at p. 1165), which the *El Dorado* court apparently equated with situations where "conversion fails" or "if the conversion is unsuccessful" (*id.* at p. 1166). The court also agreed with an earlier decision that held section 66427.5 does not apply unless there is an actual sale of at least one unit. (*El Dorado, supra*, at pp. 1166, 1177-1179, citing *Donohue v. Santa Paula West Mobile Home Park* (1996) 47 Cal.App.4th 1168 [55 Cal. Rptr. 2d 282].)

Footnote 7

The 50 percent argument was based on Health and Safety Code section 50781, subdivision (m), which specifies that one of the definitions of "resident ownership? is ?ownership by a resident organization of an interest in a mobilehome park that entitles the resident organization to control the operations of the mobilehome park." The argument was that "resident ownership of the park, and control of operations of the park, can only occur when the purchasing residents have the ability to control, manage and own the common facilities in the park, i.e., when 50 percent plus 1 of the lots have been purchased by the residents." (*El Dorado, supra*, 96 Cal.App.4th 1153, 1172, 1181.) The two-thirds figure was taken from Government Code section 66428.1, which provides that "When at least two-thirds of the owners of mobilehomes who are tenants in the mobilehome park sign a petition indicating their intent to purchase the mobilehome park for purposes of converting it to resident ownership, and a field survey is performed, the requirement for a parcel map or a tentative and final map shall be waived ... ," subject to specified exceptions.

Footnote 8

This is what is known as a "plus section," which our Supreme Court termed "a provision of a bill that is not intended to be a substantive part of the code section or general law that the bill enacts, but to express the Legislature's view on some aspect of the operation or effect of the bill. Common examples of 'plus sections' include severability clauses, saving clause, statements of the fiscal consequences of the legislation, provisions giving the legislation immediate effect or a delayed operative date or a limited duration, and provisions declaring an intent to overrule a specific judicial decision or an intent not to change existing law." (*People v. Allen* (1999) 21 Cal.4th 846, 858-859, fn. 13 [89 Cal. Rptr. 2d 279, 984 P.2d 486].) The court subsequently explained that "statements of the intent of the enacting body ... , while not conclusive, are entitled to consideration. [Citations.]

Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1280 [14 Cal. Rptr. 3d 1, 90 P.3d 1168].)

Footnote 9

Section IV of the Ordinance declares that the measure is "categorically exempt from environmental review" under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). Section V is a severability provision. Section VI establishes the effective date of the Ordinance as "30 days after the date of its passage." Section VII repeals an existing ordinance. Section VIII (mislabeled as "Section VI") provides for publication of the Ordinance in a specified newspaper of general circulation in the county.

Footnote 10

Such as the provision of the Mobilehome Parks Act directing that "This part applies to all parts of the state and supersedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part." (Health & Saf. Code, § 18300, subd. (a).)

Footnote 11

The County and supporting amici curiae note our Supreme Court stating that the Subdivision Map Act "sets suitability, design, improvement and procedural requirements [citations] and allows local governments to impose *supplemental requirements of the same kind.*" (*The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 659 [175 Cal. Rptr. 336, 630 P.2d 521], italics added.) It must be emphasized, however, that the court's comments were made in the context of a local tax—and a decade before the subject of mobilehome park conversion began appearing in the Subdivision Map Act.

Footnote 12

Because sections 66427.4, 66427.5, and 66428.1 all deal with the subject of mobilehome park conversions, it is appropriate to consider them together. (E.g., *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4 [253 Cal. Rptr. 1, 763 P.2d 852]; *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 639 [122 P.2d 526]; *In re Washer* (1927) 200 Cal. 599, 606 [254 P. 951].)

Footnote 13

El Dorado is also authority for rejecting the County's attempt to narrow the scope of the section 66427.5 hearing to just the issue of tenant displacement, thereby presumably leaving other issues or concerns of the conversion application to be addressed at a different hearing. The *El Dorado* court treated the section 66427.5 hearing as the equivalent of "El Dorado's application for approval of the tentative subdivision map." (*El Dorado, supra*, 96 Cal.App.4th 1153, 1163-1164; see also *id.*, at pp. 1174 ["section 66427.5 applies to El Dorado's application for tentative map approval ..."], 1182 [absence of majority tenant support for conversion not dispositive because "The owner can still subdivide his property by following ... section 66427.5"; judgment reversed "with directions to require the City Council to promptly determine the sole issue of whether El Dorado's application for approval of a tentative parcel map complies with section 66427.5"].) Even more germane is that, to judge from the language used in the uncodified provision enacted with the amendment of section 66427.5, the Legislature clearly appeared to equate compliance with section 66427.5 with the conversion approval process.

Footnote 14

Although it is not discussed in the briefs, a recent decision by Division Three of this district suggests these provisions might also be vulnerable to the claim that they amount to a burden of proof presumption that would be preempted by Evidence Code section 500. (See *Rental Housing Assn. of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, 751, fn. 5, 754–758 [90 Cal. Rptr. 3d 181].)

Footnote 15

That uncertainty may be illustrated by how Sequoia perceives one part of the Ordinance. With respect to instances where tenant support for conversion is between 20 percent and 50 percent, the Ordinance provides: "In such cases, the subdivider shall demonstrate, at a minimum, that a viable plan, with a reasonable likelihood of success ... is in place to convey the majority of the lots to current residents of the park within a reasonable period of time." (Sonoma County Code, § 25-39.7 (c), subd. (2)(b).) Sequoia treats this as a requirement that the subdivider come forth with "financial assistance" to assist tenants to purchase their units.

Exhibit 13

State of California — siness, Transportation and Housing Agency

Memorandum

To : Kim Strange, Deputy Director
Division of Codes and Standards

Date : March 26, 2009

From : Dennis L. Beddard, Chief Counsel
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
LEGAL AFFAIRS DIVISION

Subject: **Mobilehome Parks Act Preemption of the City of San Clemente's Non-conforming Use Ordinance As Applied Inside the Capistrano Shores Mobilehome Park.**

THIS MEMORANDUM CONTAINS A CONFIDENTIAL OPINION FOR INTERNAL DEPARTMENT USE AND SHOULD NOT BE DISTRIBUTED OUTSIDE OF THE DEPARTMENT WITHOUT APPROVAL OF THE LEGAL AFFAIRS DIVISION.

I. QUESTION PRESENTED

Does the Mobilehome Parks Act ("MPA")[1] preempt the City of San Clemente ("City") ordinance pertaining to nonconforming uses and structures[2] when applied inside a mobilehome park? Specifically, does the MPA preempt the ordinance's prohibition on replacement of a single-story manufactured home with a larger, two-story manufactured home inside the Capistrano Shores Mobilehome Park?

II. SHORT ANSWER

Yes, the City's ordinance is preempted by a combination of the MPA and the Manufactured Housing Act of 1980 ("MHA")[3] because the MPA entirely occupies the field of mobilehome park construction, maintenance, use and occupancy, including the nature of the structures that occupy spaces within a park; and the MHA occupies the field of manufactured home construction standards. As a result, a local ordinance cannot be interpreted or applied to regulate the nature of the structures permitted to occupy spaces within a mobilehome park (such as prohibiting a two-story home). The MPA does permit local governments to designate zones for mobilehome parks, and does not prohibit a locality from re-zoning the underlying land to make the park a nonconforming use. However, where a park already has been established, a locality cannot apply the zoning powers it traditionally uses to regulate nonconforming uses if those regulations encroach into areas regulated by the MPA and MHA.

Our analysis follows.

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[1] Health & Saf. Code Div. 13, Part 2.1, commencing with Sec. 18200.
[2] City of San Clemente Ordinance 1172 (1996), and implementing regulations Chapter 17.72 Nonconforming Structures and Uses.
[3] Health & Saf. Code Div. 13, Part 2, commencing with Sec. 18000.

III. FACTUAL SETTING

On September 16, 1959, the City issued Capistrano Shores Mobilehome Park (the "Park") a conditional use permit with no expiration date. The property has operated as a mobilehome park subject to the MPA from 1959 to the present time.[4] In or about 1996, the City adopted new zoning ordinances effectively down-zoning the land-use status of the Park to open space making the Park a nonconforming use and the manufactured homes contained therein nonconforming structures. Residential development, including manufactured homes, is not a permitted use in the open space zone.[5]

In January 2008, the Park was purchased by the residents from the landowner and the long-term ground lease owner/operator. The current owner is Capistrano Shores, Inc., a California non-profit mutual benefit corporation with 100% of the residential households as members of the cooperative. The City is the "local enforcement agency" for the MPA pursuant to Health and Safety Code Section 18300. On August 6, 2008, Capistrano Shores, Inc., and one of its members submitted an application to the City to replace an older single-story mobilehome with a new and larger two-story manufactured home. The City denied the permit on the basis that the proposed manufactured home did not satisfy local code requirements under the non-conforming use implementation ordinance including, but not limited to, the fact that the new manufactured home would be a two-story home and would be more than 100 square feet larger than the structure it replaces.

The Park and mobilehome owner, through their counsel, seek an opinion from the Department as to whether the City's nonconforming use implementation ordinance (hereinafter the "Ordinance")[6] as applied to the Park and the homeowner is preempted with respect to precluding replacement of a single-story mobilehome home with a larger (100 additional square feet) two-story manufactured home.

III. APPLICABLE LAWS AND REGULATIONS

A. Police Powers, Regulation of Nonconforming Uses, and the City's Ordinance.

1. Police Powers.

Authority for local governments to regulate land use derives from the "police power" granted by the California Constitution which states:

> A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws (emphasis added).[7]

The Legislature has adopted general laws with respect to planning and land use, including zoning.[8] With respect to state laws affecting zoning, the Legislature has declared its intent to "provide only a

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[4] September 25, 2008, letter to the Department from L. Sue Loftin, the Park's attorney.
[5] *Id.*
[6] Hereinafter, City of San Clemente Ordinance 1172 (1996), Chapter 17.72 is referred to as the "Ordinance". Repair, maintenance and improvements to nonconforming structures are dealt with in Section 17.72.030 of the Ordinance.
[7] Cal. Const. Art. XI, Sec. 7.

minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."[9]

2. Nonconforming Uses.

A city or county's zoning authority includes the authority to designate specific land uses as a nonconforming use.[10] Certain general principles apply to nonconforming use designations.

> A nonconforming use describes a lawful use existing on the effective date of a new zoning restriction that has continued since that time without conformance to the ordinance. While the policy of the law is for elimination of nonconforming uses, as a general rule, a new zoning ordinance may not operate constitutionally to compel immediate discontinuance of an otherwise lawfully established use or business. (Citations omitted) However, if an activity constitutes a public nuisance, it can be removed immediately as long as due protections are provided. (Citations omitted)
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> Zoning laws look to the future and the eventual elimination of nonconforming uses to effectuate change or to accommodate changed circumstances. . . . (Citations omitted) Given the objective of zoning to eliminate nonconforming uses, courts generally follow a strict policy against the extension or enlargement of nonconforming uses. (Citations omitted) The spirit of a zoning ordinance with a provision permitting continued nonconforming uses is to allow, but not increase, the nonconforming use. Intensification or expansion of an existing nonconforming use . . . is not permitted. . . .
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> California courts have relied upon a case-by-case balancing approach to determine when a city can properly terminate a nonconforming use. The courts have upheld termination provisions where a reasonable period of time to recover the permit holder's investment is allowed. (Citations omitted) [11]

3. The City's Ordinance.

The City enacted the Ordinance in order to establish regulations for nonconforming uses and structures with the intent that nonconforming uses and structures will convert to conforming uses and structures.[12] However, the Ordinance also provides that until nonconforming uses and structures are converted, improvements to them which promote their compatibility with their neighborhoods, enhance the quality of development, and do not increase nonconformity should be encouraged and allowed.[13]

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[8] See Gov. Code Title 7, commencing with Sec. 65000; and see Title 7, Div. 1, Ch. 4, commencing with Sec. 65800.
[9] See Gov. Code Sec. 65800.
[10] See *Miller v. Board of Public Works* (1925) 195 Cal. 477, 487; *Acker v. Baldwin* (1941) 18 Cal.2d 341, 344; *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 337.
[11] Curtin and Talbert, Curtin's California Land Use and Planning Law (25th ed. 2005) Nonconforming Uses – Amortization, p. 61.
[12] See San Clemente Municipal Code, Title 17, Sec. 17.72.010, Purpose and Intent.
[13] *Ibid.*

The Ordinance specifically deals with repair, maintenance and improvements to nonconforming structures and uses.[14] These terms are described in the Ordinance as follows:

> Repair, maintenance, and aesthetic improvements typically include painting, landscaping, paving, the replacement and addition of skylights, windows, doors, open spaces, and other features which promote the livability of the dwelling and its compatibility with and enhancement of the neighborhood (emphasis added).[15]

The Ordinance regards the addition of a second story to a dwelling to be a major alteration or expansion that may only be allowed through issuance of a conditional use permit.[16]

B. The Mobilehome Parks Act and Regulations.

1. The Mobilehome Parks Act.

For purposes of the question presented, the relevant provisions of the MPA follow:

The Legislature has found that because of the relatively permanent nature of residence in mobilehome parks, and the substantial investment which a manufactured home represents, residents of parks are entitled to live in conditions which assure their health, safety, and general welfare.[17]

The Legislature also has found that the standards and requirements established for the construction, maintenance, occupancy, use, and design of mobilehome parks should guarantee park residents maximum protection of their investment and a decent living environment.[18] "At the same time, the standards and requirements should be flexible enough to accommodate new technologies and to allow designs that reduce costs and enhance the living environments of park residents."[19] Finally, the Legislature has found that the specific requirements relating to the above standards and requirements are best developed by the Department.[20]

Of particular importance to this opinion are the provisions of Health and Safety Code Section 18300 which read in relevant part:

> 18300. (a) This part applies to all parts of the state and supersedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part. Except as provided in Section 18930, the department may adopt regulations to interpret and make specific this part and, when adopted, the regulations shall apply to all parts of the state.
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[14] See *id.* Secs. 17.72.030 and 17.72.040.
[15] *Id.*, Secs. 17.72.030 A. and 17.72.040 A.
[16] See *id.*, Secs. 17.72.030 B.2.a., C; 17.72.040 B.2.b, C.
[17] Health and Saf. Code Sec. 18250.
[18] Health and Saf. Code Sec. 18251.
[19] *Ibid.*
[20] Health & Saf. Code Sec. 18253.

> (g) This part shall not prevent local authorities of any city, county, or city and county, within the reasonable exercise of their police powers, from doing any of the following:
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> (1) From establishing, subject to the requirements of Sections 65852.3 and 65852.7 of the Government Code, certain zones for manufactured homes, mobilehomes, and mobilehome parks within the city, county, or city and county, or establishing types of uses and locations, including family mobilehome parks, senior mobilehome parks, mobilehome condominiums, mobilehome subdivisions, or mobilehome planned unit developments within the city, county, or city and county, as defined in the zoning ordinance, or from adopting rules and regulations by ordinance or resolution prescribing park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking or from prescribing the prohibition of certain uses for mobilehome parks (emphases added).
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> (5) From prescribing and enforcing setback and separation requirements governing the installation of a manufactured home, mobilehome, or mobilehome accessory structure or building installed outside of a mobilehome park (emphasis added).

2. MPA Regulations.

Pursuant to the authority of the MPA, the Department has adopted regulations covering the construction, use, maintenance, and occupancy of mobilehome parks.[21] This extensive and comprehensive set of regulations encompasses over 400 sections dealing with every aspect of a mobilehome park and the installation of manufactured homes, except as provided in Health and Safety Code Section 18300 (and two other sections not relevant to this opinion).[22]

Pursuant to the authority of the MPA, the Department has adopted regulations covering such topics as lot line changes, roadways, lighting, occupied area of a lot, lot and park area grading, and lot occupancy.[23]

C. The Manufactured Housing Act.

The Manufactured Housing Act of 1980 ("MHA")[24] governs, among other things, the construction of manufactured homes and mobilehomes including the areas of structural, fire safety, plumbing, heat-producing, and electrical systems.[25] Of particular importance to this opinion are the following provisions of the MHA:

> 18000. (a) This part shall be known and may be cited as the Manufactured Housing Act of 1980.[26]

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[21] See Cal. Code Regs, tit. 25, Div. 1, Ch. 2, commencing with Sec. 1000.
[22] See Cal. Code Regs, tit. 25, Sec. 1000(a); and see Health & Saf. Code Secs. 18303 and 18304 (exemption from MPA for parks owned, operated and maintained by governmental entities, and for conventionally dwellings regulated by the State Building Standards Code).
[23] See 25 Cal.Code of Regs. Secs. 1105, 1106, 1108, 1110, 1116, and 1118.
[24] Health & Saf. Code Div. 13, Part 2, commencing with Sec. 18000.
[25] See Health & Saf. Code Secs. 18015 and 18025.
[26] Health & Saf. Code Sec. 18000.

> 18015. The provisions of this part apply to all parts of the state and supersede any ordinance enacted by any city, county, or city and county which conflict with the provisions of this part. The department may promulgate regulations to interpret and make specific the provisions of this part relating to construction, titling and registration, occupational licensing, advertising, commercial transactions, and other related or specifically enumerated activities, and, when adopted, these rules and regulations shall apply in all parts of the state. The department may promulgate rules and regulations to interpret and make specific the other provisions of this part and when adopted these rules and regulations shall apply in all parts of the state (emphasis added).[27]
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> 18030.5. A manufactured home, mobilehome, recreational vehicle, commercial coach, or special purpose commercial coach which meets the standards prescribed by this chapter, and the regulations adopted pursuant thereto, shall not be required to comply with any local ordinances or regulations prescribing requirements in conflict with the standards prescribed in this chapter (emphasis added).[28]

Among other things, the MHA regulates alterations or conversions of manufactured homes and mobilehomes.[29]

D. The Law of Preemption and Its Application to Local Zoning, the MPA and the MHA.

1. The Law of Preemption and Local Land Use.

> [T]he "general principles governing state statutory preemption of local land use regulation are well settled. 'The Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 et seq.)' even though it also 'has carefully expressed its intent to retain the maximum degree of local control (see, e.g., *id.*, §§ 65800, 65802)." (*IT Corp. v. Solano County Bd. of Supervisors* [, *supra*,] 1 Cal.4th [at p.] 89, 2 Cal.Rptr.2d 513, 820 P.2d 1023.) ' A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Cal. Const., art. XI, § 7, italics added.)' "Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates [citations], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citations]." ' " (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747, 29 Cal.Rptr.2d 804, 872 P.2d 143.)
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> Local legislation is "duplicative" of general law when it is coextensive therewith and "contradictory" to general law when it is inimical thereto. Local legislation enters an area "fully occupied" by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent. (*Great Western Shows, Inc. v. County of Los Angeles, supra*, 27 Cal.4th at pp. 860-861, 118 Cal.Rptr.2d 746, 44 P.3d 120.)"[30]

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[27] Health & Saf. Code Sc. 18015.
[28] Health & Saf. Code Sec. 18030.5.
[29] See Health & Saf. Code Sec. 18029.
[30] *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150.

2. Preemption and the MPA.

a. Implied Preemption. The Legislative findings above, coupled with the goal of the MPA to promote the health and safety of mobilehome park residents through uniform state-wide standards for mobilehome park construction, impliedly demonstrates that the state fully occupies the field of mobilehome park construction, maintenance, occupancy, use and design. As one court has stated:

> Indeed, the goal of uniformity can only be achieved through occupation of the field, alleviating variances in local regulation. The MPA's purpose of protecting the health and welfare of the residents of mobilehome parks as well as the investment value of mobilehomes can only be achieved through the centralized regulatory power of the HCD. Without such centralized regulation, mobilehome owners would be subject to the specific and particularized whims of a local county or municipality, and would in effect be hampered in his or her ability to move the mobilehome within the state. [fn omitted] This result is clearly what the Legislature intended to prevent with the enactment of the MPA.[31]

b. Express Preemption. In addition to implied preemption, the Legislature has expressly provided that the MPA and implementing regulations preempt local regulation by stating:

> This part applies to all parts of the state and supersedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part. Except as provided in Section 18930, the department may adopt regulations to interpret and make specific this part and, when adopted, the regulations shall apply to all parts of the state. (Health & Saf. Code Sec. 18300).

Given these statements by the Legislature and the holdings in *County of Santa Cruz v. Waterhouse*, *supra*. (hereinafter referred to as *"Waterhouse"*), there can be little doubt that the MPA occupies the entire field of standards and requirements for construction, maintenance, occupancy, use and design of mobilehome parks,[32] subject only to exceptions set forth in Health and Safety Code Section 18300(g) which are discussed below.

3. Preemption and the MHA. Based on the statutes cited in Section III.C. above, the Legislature has expressly preempted the field of manufactured home construction standards, including alteration and conversion of a manufactured home.

IV. ANALYSIS

To restate the question: Where the land underlying a mobilehome park has been re-zoned making the park a nonconforming use, and the homes and structures therein nonconforming structures, do the MPA and the MHA preempt a local nonconforming use implementation ordinance that prohibits the replacement of a single-story manufactured home with a larger two-story manufactured home?

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[31] *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483, 1489-1490.
[32] See Health & Saf. Code Sec. 18251.

1. Scope of the Specific Exceptions to MPA Preemption.

While the MPA preempts the field of mobilehome park regulation, subdivision (g)(1) of Health and Safety Code Section 18300 also reserves to localities, within the reasonable exercise of their police powers, the authority to:

- Establish zones for mobilehome parks;
- Establish types of uses and locations (e.g., family or senior mobilehome parks); and
- Regulate:
  - Park perimeter walls or enclosures on public street frontage,
  - Signs,
  - Access, and
  - Parking.[33]

Thus the narrower question is: Does the City's Ordinance fall into any of these exceptions?

The discussion and conclusion of the court in *Danville Fire Protection District v. Duffel Financial & Construction Company*[34] is instructive with respect to the scope of powers reserved to localities in subdivision (g)(1). In *Danville* the court was called upon to determine whether a local fire protection district could adopt residential fire sprinkler system requirements that were more restrictive than permitted under the local building code which had been adopted pursuant to state building standards law. The court determined that the state had preempted the field of residential building standards. However, as with the MPA, state law reserved some regulatory authority to local jurisdictions.[35] With respect to these "carve outs" from the general state preemptive scheme, the court stated:

> The district argues that the proviso 'Except as otherwise specifically provided by law' at the beginning of section 17922 specifically indicates that the Legislature did not intend to restrict the power of local autonomous fire districts to adopt ordinances as authorized by section 13869 .... . However, section 13869 is a general grant of authority in contrast to the very specific provisions of 17922, 17958, and 17958.5, quoted above. Thus, the more specific statutory provisions govern the general ones ... . The only delegation of authority to local governments to regulate in this area is in section 17922, ... that specifically limits local regulations to use zones, fire zones, building setback, side and rear yard requirements, and property line requirements. Ordinance No. 5 regulates none of these and the specific grant of reserved local jurisdiction of section 17922 is a very limited one. Further, the limited grant of reserved power to local entities is by implication a denial of the grant of any greater jurisdiction (emphasis added).[36]

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[33] See Health & Saf. Code Sec. 18300(g)(1).

[34] *Danville Fire Protection District v. Duffel Financial & Construction Company* (1972) 58 Cal.App.3d 241.

[35] See Health & Saf. Code Section. 17922, which provides in part that local use zone requirements, local fire zones, building setback, side and rear yard requirements, and property line requirements are specifically and entirely reserved to the local jurisdictions.

[36] *Danville*, *supra*, at pages 246-247, cited favorably in *Briseno v. City of Santa Ana* (1992) 6 Cal.App.4th 1378 at 1383.

Similarly, the very specific grants of authority in subdivision (g)(1) must be interpreted to be a limited grant of reserved power to local governments, and a denial of the grant of any greater jurisdiction.

Finally, under the maxim of statutory construction *expression unis est exclusion alterius,* if exemptions are specified in a statute, a court may not imply additional exemptions unless there is a clear legislative intent to the contrary.[37]

Clearly subdivision (g)(1) does not contain an express grant of authority to localities to regulate the size or height of a manufactured home located in a mobilehome park; and no such grant of authority should be implied.

2. The Scope of the "Zoning" Exemption.

Apparently the City has made the argument that its authority to regulate the size or height of a manufactured home stems from the MPA grant of authority to establish zones for mobilehome parks and establish types of uses and locations of parks.[38]

In interpreting a statute, courts begin with the actual language of the statute; and in examining the language, the courts should give to the words of the statute their ordinary, everyday meaning unless the statute itself specifically defines those words to give them a special meaning.[39] In this case, we are called upon to discern the Legislature's meaning for the phrase "certain zones for ... mobilehome parks ...". The terms "zone" or "zones" are not defined in the MPA.[40] Therefore, the terms should be given their everyday meaning, but in the context of local land use planning.[41] The dictionary definition of "zone" appropriate in this context is: "A municipal area in a city designated for a particular type of building, enterprise, or activity: *residential zone* (italics in original)."[42] In other words, "zone" refers to a geographic area wherein a specified type of building or activity may be located.

In the case at hand, the City did exercise its power to zone when it adopted ordinances changing the designated land use under the Park, making the Park a nonconforming use. However, the power to designate *where* a mobilehome park may be *geographically located* does not encompass the power to determine the spatial arrangements within the park or the nature of the structures located in the park.

To interpret the zoning exemption as permitting local regulation of activities and structures within an established park would be inconsistent with several canons of statutory construction: the above-discussed canon that exceptions are to be interpreted narrowly; the canon that statutes are not to be interpreted in a manner that would lead to absurd results; and the canon that a statute is not to be

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[37] See *Sierra Club v. State Board of Forestry (Pacific Lumber Company)* (1994) 7 Cal.4th 1215, 1230.
[38] See July 22, 2008, letter from Jeffrey M. Oderman of Rutan & Tucker, LLP to L. Sue Loflin, Esq. (hereinafter, the "Oderman letter."
[39] See *Davis v. Harris* (1998) 61 Cal.App.4th 507 at 511.
[40] See Health & Saf. Code Sec. 18000 for definitions governing the MPA.
[41] See *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 337 (words of statute to be read in context, keeping in mind the nature and obvious purpose of the statute.)
[42] American Heritage Dict. (New College ed. 1980) p. 1490, col. 1.

interpreted in a manner that would permit accomplishment by indirection that which is prohibited directly.

a. Absurd results. When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation; in this regard, it is presumed that the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences.[43]

If the zoning exception in subdivision (g)(1) is interpreted to permit the City to apply its Ordinance without restriction, the result would be the City's ability to regulate: "repair, maintenance, and aesthetic improvements which typically include painting, landscaping, paving, the replacement and addition of skylights, windows, doors, open spaces, and other features which promote the livability of the dwelling and its compatibility with and enhancement of the neighborhood."[44] Had the Legislature intended to permit localities to regulate in these specific areas, it could easily have done so by inserting these exceptions into the list in (g)(1), but it did not. Moreover, landscaping and paving are clearly areas preempted by the MPA. And the MHA governs all aspects of manufactured home construction, rehabilitation, and repair which would include replacement of skylights, windows and doors. Interpreting the term "zone" to permit localities to regulate in these areas would create a hodgepodge of local regulation of mobilehome parks and the structures located therein – the antithesis of the Legislature's desire for state-wide uniformity – thus leading to absurd results.

b. Indirect Accomplishment. Interpretation of a statute to infer that the Legislature intended to do indirectly what it refrained from doing directly is disfavored.[45] The Legislature has expressly preempted the field of mobilehome park construction, maintenance, occupancy, use, and design with a sprinkling of exceptions that are to be construed narrowly. An interpretation of the term "zone" to encompass the ability of localities to regulate such things as park landscaping, open space and paving would permit localities to accomplish indirectly what has been denied them directly. Such an interpretation should be rejected.

3. The Holding in *Waterhouse*. In *Waterhouse*, a mobilehome park owner sued a county over its ordinance restricting the height of manufactured homes in mobilehome parks to a single story.[46] As part of its defense, the county asserted that its general authority to regulate land use coupled with its reserved authority to regulate zones for mobilehome parks gave it authority to regulate the height of manufactured homes. The *Waterhouse* court found the county's argument unpersuasive and stated:

In support of its position that the zoning exception in the MPA provides it authority to

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[43] See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165-1166.
[44] See San Clemente Municipal Code, Title 17, Secs. 17.72.030 A. and 17.72.040 A.
[45] See *People v. Superior Court In and for Los Angeles County (Guerro)* (1962) 199 Cal.App.2d 303, 308; cited favorably in *Rocklite Products v. Municipal Court of Los Angeles Judicial Dist.*(1967) 217 Cal.App.2d 638, at 647.
[46] The facts in *Waterhouse* are slightly different from the present case in that the county had adopted an ordinance specifically limiting the height of manufactured homes in mobilehome parks to one-story. In contrast, the City's Ordinance does not target manufactured homes in mobilehome parks. Rather, it is a fairly typical nonconforming use ordinance that applies throughout the City and is designed to curtail any expansion of the nonconforming use and, over time, result in the termination of the use. Nonetheless, the holding in *Waterhouse* would seem to control the facts of the present case.

> regulate the height of mobilehomes, the County argues that the land use regulations of Government Code section 65800 et seq. referenced in section 18300, subdivision (g) allow for local regulation of the height of mobilehomes. Specifically, Government Code section 65850 authorizes localities to enact zoning ordinances, and ordinances regarding signs and billboards, lot size, yard and open space, and parking. The County asserts that these provisions give it the authority to regulate the height of mobilehomes within its confines. However, when compared to the provisions of Section 18300, it is clear that the Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions of *where* a mobilehome park may be located, vehicle parking, and lot lines, not the structures within the parks (emphasis in original).[47]

It is our understanding that the County has advanced the opinion that the facts of this matter are more akin to those in the case of *Lagrutta v. City Council* [48] [49] rather than the facts in *Waterhouse*. In *Lagrutta*, the question was whether the city could deny the initial issuance of a special use permit for a mobilehome park in the City of Stockton. It is our opinion that *Lagrutta* is inapplicable to the facts before use because it involved a city's authority to determine the initial location of a mobilehome park. This authority is clearly granted by the MPA and not contested by the Department. However, once a mobilehome park has been established, even if the underlying land is later re-zoned making the park a nonconforming use, the park remains subject to the preemptive jurisdiction of the MPA and the MHA.[50]

4. Reconciliation of the Preemptive Nature of the MPA with Lawful Use of the Police Power to Terminate Nonconforming Uses.

The Legislature has established a comprehensive scheme for the adoption and administration of local zoning regulations; and the Legislature also has adopted a comprehensive scheme for regulation of mobilehome parks, which reserves the right of localities to create zones for mobilehome parks. The challenge before us is to reconcile these two bodies of law given the fact that the Park was already in existence as a lawful use when the City rezoned the underlying land to open space.

Courts have held that statutes that relate to the same thing or have a common purpose should be read together and harmonized if possible. Even when one statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold both of them if it is reasonably possible to do so.[51]

It is our opinion that state planning and zoning law can be reconciled with the preemptive schemes of the MHA and MPA such that the goals and objectives of all three bodies of law may be achieved. This result can be achieved by interpreting these laws together to permit localities to regulate "where"

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[47] *Waterhouse, supra.* at 1493.
[48] See the Oderman letter, *supra.*
[49] *Lagrutta v. City Council* (1970) 9 Cal.App.890.
[50] The *Waterhouse* court also concluded that *Lagrutta* was inapplicable to the facts in *Waterhouse* on the basis that the MPA does not provide local authority to enact regulations governing construction of manufactured homes. See *Waterhouse supra* at 1492.
[51] See *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965.

mobilehome parks may be located (including rezoning land to make an existing park a nonconforming use, or declaring the existence of a mobilehome park to be a nuisance pursuant to applicable laws), and reserving to the state all authority to regulate within an existing mobilehome park, with the narrow exceptions of park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking which may be regulated by local governments.[52]

This interpretation would preserve the integrity of the preemptive scheme of the MPA, and would permit the individual manufactured homes and other structures within the Park to be rebuilt, replaced, enlarged, and repaired without being impaired by the limitations of a locality's nonconforming use regulation. This outcome is consistent with the Legislature's finding that because of the relatively permanent nature of residence in mobilehome parks, and the substantial investment which a manufactured home represents, residents of parks are entitled to live in conditions which assure their health, safety, and general welfare.[53] And this interpretation would further the Legislature's intent that mobilehome park standards be flexible enough to accommodate new technologies and enhance the living environments of park residents.[54]

At the same time, this interpretation would effectively allow termination of the use of the land as a mobilehome park consistent with planning and zoning statutes and case law (e.g., through use of eminent domain, amortization of park owner's investment, or abatement as a nuisance). Consistent with this interpretation, a rezoning or down zoning action by the local government would also provide notice that a park could not be expanded (e.g., more spaces added) inconsistent with the new zoning.

Finally, such an interpretation acknowledges the nonconforming status of a mobilehome park while protecting the interests of the individual residents therein.

5. MHA Preemption.

As noted above, the provisions of the MHA supersede any ordinance enacted by a local government which conflicts with the provisions of the MHA. Additionally, a manufactured home or mobilehome which meets the standards of the MHA and implementing regulations is not required to comply with any local ordinance prescribing requirements in conflict therewith.

The MHA establishes construction standards for mobilehomes, manufactured homes, and two-story manufactured homes. Therefore, to the extent that the provisions of the City's Ordinance pertaining to the repair, maintenance, or replacement of a manufactured home or mobilehome conflict with the MHA and its implementing regulations, the City's requirements are preempted.

The MHA expressly defines "mobilehome" and "manufactured home".[55] The MHA does not limit the number of stories for a manufactured home. (However, the MPA limits the height of manufactured homes on permanent foundations in mobilehome parks to two stories.[56])

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[52] With respect to nonconforming uses, this interpretation is akin to saying that the mobilehome park as a whole is the nonconformity, not the individual lots or manufactured homes located therein.
[53] See Health & Saf. Code Sec. 18250.
[54] See Health & Saf. Code Sec. 18251.
[55] See Health & Saf. Code Secs. 18008(a) and 18007(a).

Thus, any attempt by a locality to distinguish between permissible or impermissible types of manufactured homes or mobilehomes, or to limit installation of a "mobilehome" or "manufactured home" to a single-story structure for purposes of imposing construction, repair, replacement, or maintenance standards is preempted by the MHA.

6. Preempted Local Ordinances Are Void.

Finally, it must be noted that local regulations in conflict with general laws are void, and therefore unenforceable. The California Supreme Court has stated:

> "Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates (citations omitted), contradicts (citations omitted), or enters an area fully occupied by general law, either expressly or by legislative implication (citations omitted). If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair' (citations omitted) (emphasis added).[57]

Thus, application of the City's Ordinance within an established mobilehome park in areas preempted by the MPA and MHA is void and unenforceable.

V. CONCLUSION

Based on: (1) the express preemption of the field of manufactured home construction standards; (2) express and implied preemption of the field of standards for construction, maintenance, occupancy, use, and design of mobilehome parks; (3) accepted rules of statutory construction; and (4) case law (i.e., *Waterhouse*), it is our conclusion that the Mobilehome Parks Act and Manufactured Housing Act of 1980 collectively preempt any local regulation, including zoning, when applied to the interior of an existing mobilehome park with the narrow exceptions of park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking.

Please let us know if you have any questions regarding this opinion.

cc: Doug Hensel, Assistant Deputy Director
Ron Javor, Assistant Deputy Director of Codes and Standards
Chris Anderson, Chief of Field Operations

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[56] See Health & Saf. Code Sec. 18551.1(d).
[57] *Deukemjian v. County of Mendocino* (1984) 36 Cal.3d 476, 484-485.

Exhibit 14

STATE OF CALIFORNIA, BUSINESS, TRANSPORTATION AND HOUSING AGENCY Arnold Schwarzenegger, Governor
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF CODES AND STANDARDS
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April 21 2008

Information Bulletin 2008 – 10 (MP)

TO: **Local Government Planning Agencies**
Local Building Officials
Mobilehome Park Operators and Residents
Mobilehome Park Interested Parties
Division Staff

SUBJECT: VALIDITY OF LOCAL ORDINANCES RELATING TO INSTALLATION OF NEW MANUFACTURED HOMES AND/OR SALE OR CONVERSION OF MOBILEHOME PARKS

A number of local governments are enacting or enforcing ordinances relative to the physical operation and condition of mobilehome parks and recreational vehicle parks that are in conflict with the preemptive nature of the Mobilehome Parks Act ("MPA"), found in Health & Safety Code]"H&SC"] sections 18200, et seq., and the Special Occupancy Parks Act ("SOPA"), found in H&SC sections 18665, et seq.. Throughout this memorandum, there are references to "manufactured homes", "mobilehome parks" and "the Mobilehome Parks Act"; however, unless otherwise noted, the same issues and rules apply to recreational vehicles or park model trailers, recreational vehicle parks, and the Special Occupancy Parks Act.

This memorandum's purpose is to provide information and clarification for local government officials and those involved with mobilehome parks and manufactured home installations or sales that state law restricts local government authority attempting to regulate the physical structure and operation of mobilehome parks—whether privately-owned, resident-owned, or in the process of conversion. For example, local ordinances which impose inspection, lot standards, or infrastructure requirements within a mobilehome park at the time of home installation, conversion, or sale generally are expressly and/or impliedly preempted by the MPA, and the only valid authority for imposing and enforcing these requirements is the California Department of Housing and Community Development ("HCD") or local enforcement agencies that have assumed jurisdiction to enforce the MPA.

Statutory Provisions Governing Preemption

California courts have established guidelines for when local ordinances are preempted by state law. The general rule is that, if an otherwise valid local ordinances conflicts with preemptive state law, it is invalid. A "conflict" exists if an ordinance "duplicates, contradicts, or enters an area fully occupied by state law, either expressly or by implication". In addition, preemption is implied if the area is so fully covered by state law as to indicate it is exclusively a matter of state concern; it is partially covered by state law but the state coverage indicates that a paramount state concern will not allow additional

local action; or there is partial state coverage but the adverse effect of a local ordinance on state residents outweighs the possible benefit to the locality.

The MPA contains an express preemption, with minimal express authority for local ordinances. In addition, the Legislature's findings support its intent to allow only very restrictive authority for local government action within the boundaries of a mobilehome park. In the MPA, subdivision (a) of H&SC section 18300 provides that "the MPA and HCD regulations apply to all parts of the state and supersede any ordinance enacted by any city, county, or city and county, whether general law or chartered, affecting parks." Subdivision (g) and (h) of section 18300 provide the limited specific exceptions to the general state preemption, stating that the MPA does not preclude local governments, within the reasonable exercise of their police powers, from doing any of the following:

* Enacting certain zones for mobilehome parks within the jurisdiction, or establishing types of uses and locations such as senior mobilehome parks, mobilehome condominiums, or mobilehome subdivisions within the jurisdiction. [subdivision (g)(1)]

* Adopting ordinances, rules, regulations or resolutions prescribing park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking; or prescribing the prohibition of certain uses for mobilehome parks. [subdivision (g)(1), emphasis added]

* Regulating the construction and use of equipment and facilities located outside of a manufactured home or mobilehome used to supply gas, water, or electricity thereto or to dispose of sewage *when the facilities are located outside a park*. [subdivision (g)(2), emphasis added].

* Requiring a permit to use a manufactured home or mobilehome *outside a park* which permit may be refused or revoked if the use violates the MPA or the Manufactured Housing Act. [subdivision (g)(3), emphasis added.]

* Requiring a local building permit to construct an accessory structure for a manufactured home or mobilehome when the manufactured home or mobilehome is *located outside a mobilehome park*,. [subdivision (g)(4), emphasis added]

* Prescribing and enforcing setback and separation requirements governing manufactured home, mobilehome, or mobilehome accessory structure or building *installation outside of a mobilehome park*. [subdivision (g)(5), emphasis added]

Other provisions directly addressing preemptive authority include H&SC sections 18253, 18400.1, 18605, 18610, and 25 CA Code of Regulations (CCR), section 1000.

Permissible Local Government Regulation and Standards

Local governments do have some authority to regulate certain physical components in a mobilehome park. Also, pursuant to subdivision (b) of H&SC section 18300, they may assume MPA enforcement authority and become a "local enforcement agency" ("LEA"), rather than relying on HCD inspectors.

As stated above, subdivision (g) of H&SC section 18300 provides express authority for local governments, within the reasonable exercise of police powers, to adopt zoning ordinances to

allow or prohibit parks and certain park uses, and for park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking. Also, subdivision (h) of that section allows local governments, within specified parameters, to establish new park density, to require recreational facilities, and to require setback and separation requirements for manufactured housing outside of parks, but no greater than those permitted by applicable ordinances for other affordable housing forms.

H&SC section 18691, subdivision (b), permits a local government that is the MPA enforcement agency to enforce within parks its own fire code that imposes standards equal to or greater than the restrictions in the California Building Standards Code ("CBSC") and other state requirements. In addition, a local government which is not a local enforcement agency may assume fire prevention authority and impose certain portions of its fire code within a park.

Subdivision (e) of H&SC section 18501 and Title 25 CCR, section 1032, permit a local government to approve or deny approval for any construction permit to build or increase the size of a park or to add multifamily manufactured housing based on "compliance with all valid local planning health, utility and fire requirements". (H&SC §18501, emphasis added). The use of the word "valid" implicitly excludes requirements preempted by the MPA, allowing, for example, flood plain ordinance compliance, the minimum size of a park's land parcel, whether a septic system sewer hook-up is required, where and whether off-site drainage is permitted, and/or the number and spacing of fire hydrants.

Local Ordinance Provisions Which Are Preempted

General Background

In implementing the Legislature's comprehensive statewide program to establish and enforce park standards for construction, maintenance, repairs, and occupancy, the Department's statutory and regulatory standards impose standards for virtually every aspect of a park's or a manufactured home's physical conditions, except for those expressly left to local government action in subdivision (h) of H&SC section 18300.

With respect to construction of a new or expanded park, or installation of multifamily manufactured housing, HCD regulations require evidence of local approvals from the local planning agency; the health, fire, and public works departments; the agency responsible for flood control; the serving utilities; and any other state or federal agency or special district that has jurisdiction and would be impacted by the proposed construction. (25 CCR §§1020.6, 1032). Similarly, HCD or the LEA may require local approvals for construction of a permanent building under the ownership or control of the park within a park if that installation may impact local services. Most other types of construction, replacements, installations, and alterations require an MPA enforcement agency permit and inspections (25 CCR § 1018), but no local approvals.

HCD regulations govern both park construction and manufactured home installation standards and procedures. Generally, the regulations require that a home and other structures on a park lot use not more than 75% of the lot space (25 CCR §1110) and that the home and structures have specified set-backs and separations from lot lines and structures

(25 CCR §1330). In addition, a "manufactured home" is a specific preemptive definition in H&SC section 18007 and a recreational vehicle (including a park model) is a specifically defined term in H&SC section 18010. As a result, a local government cannot impose restrictions on the minimum or maximum size of a manufactured home to be installed on a mobilehome park lot (ordinance precluding two-story manufactured homes found invalid in *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th, 1483, 26 Cal.Rptr 3d 543) or whether a park model or recreational vehicle can be installed on a recreational vehicle lot.

Examples of Preempted Ordinance Provisions

The following italicized sentences are examples of local ordinances that have been brought to HCD's attention and that area preempted by state laws and regulations.

"If there has been no Title 25 inspection within 3 years, one must be obtained". H&SC sections 18605 and 18610 provide that HCD's rules govern park maintenance and operation. No express or implied exception exists in H&SC section 18300 permitting local governments to impose inspection requirements related to park maintenance.

"The Park owner shall provide a list of all Title 25 deficiencies found on inspection and evidence that all deficiencies have been corrected." Pursuant to H&SC sections 18605 and 18610, HCD's rules govern park maintenance and operation. Pursuant to the preemptive restrictions in H&SC section 18300, no express or implied exception exists permitting local governments to impose enforcement requirements related to park maintenance. In addition, the MPA does not require correction of all deficiencies:

* The MPA expressly permits extended periods for repairs to achieve correction of deficiencies. H&SC section 18420, subdivision (c)(4), permits the enforcement agency to defer repair requirements as long as there is a "valid reason why a violation has not been corrected, including, but not limited to, weather conditions, illness, availability of repair persons, or availability of financial resources...."
* The MPA permits an inspector to not cite a violation of the MPA if it is not an imminent hazard. (subdivision (d) of H&SC section 18420)

"Written documentation from HCD shall be obtained demonstrating that the park complies with all applicable Title 25 requirements." The MPA governs performance of inspections and issuance of reports of violations or corrections and does not require HCD or an LEA to perform inspections to ensure compliance with "all applicable" Title 25 requirements. A "complaint inspection" involves resolution of a specific complaint. A "park maintenance inspection" involves identification and resolution of only hazards which are either an immediate risk to life, health, and safety, requiring immediate correction; or those constituting unreasonable risks to life, health or safety, requiring correction with 60 days (H&SC §18400.3). No other violations of Title 25 are recorded.

"Proof of remediation of any Title 25 violations shall be confirmed in writing by the California Department of Housing and Community Development." In addition to the obvious issue that a local government cannot require HCD to perform any duties related to parks, HCD does not have enforcement responsibility for many of the state's parks and therefore has no information regarding any identified violations or proposed or completed remedies in those parks subject to LEA enforcement.

"Prior to installation of a new home on an existing lot, there shall be two covered and paved parking spaces on the lot." Subdivision (f) of Title 25 CCR section 1106 expressly and fully regulates paving for driveways and roadways, stating that paving generally is not required; therefore, local governments may not impose paving requirements. Title 25 CCR sections 1110, 1116, and 1118 regulate lot standards, precluding local government lot standards such as covered parking or a specific number of on-lot spaces. [While H&SC §18300(g)(1) provides local governments with authority to regulate "vehicle parking", that authority is narrowly interpreted and harmonized with the preemptive nature of the MPA by allowing local government ordinances to reasonably require a specified number of parking spaces within the boundaries of the park (to avoid public street parking), but without imposing their own specific location.]

"No manufactured home may be installed on a lot of less than 4000 square feet, with a minimum depth of 75 feet and a minimum width of 50 feet, at least a fifteen-foot setback from any other home, and at least a ten-foot separation between all structures on the lot other than an attached cabana or covered patio." The MPA implicitly preempts local authority to establish lot sizes by virtue of the standards in 25 CCR sections 1110 and 1118; see also, 25 CCR section 1106(e); in addition, subdivision (g) of H&SC section 18300 allows local governments to establish "density", not lot sizes or locations. The set-back and separation requirements are expressly established by 25 CCR section 1330; in addition, by implication, local action is precluded with respect to setbacks and separations because, in subdivision (h)(3) of H&SC section 18300, the Legislature authorized local action in this area only for manufactured homes sited outside of mobilehome parks.

"The sides of the park facing a public street and the sides facing residential construction shall have walls high enough to block sight access of the roofs of the mobilehomes with ivy or other permanent foliage coverage, and no mobilehome shall be closer than 15 feet from the wall or fence." The locality is authorized, by subdivision (h) of H&SC section 18300, to regulate only the wall or enclosure on the public street frontage, not other sides of the park. The locality is authorized to establish a set-back for the wall or enclosure on the public street frontage, but all other set-back and separation requirements (within the boundaries of the park) are preemptively established by the MPA regulations.

"Every lot in a mobilehome park shall have no more than one mobilehome and one storage shed, and foliage shall be consistent with the surrounding area." This ordinance establishes "lot standards". When H&SC section 18300 was amended in 1981, the express authority for local governments to regulate "landscaping" and establish standards for lots, yards, and park area in mobilehome parks was deleted by the Legislature, depriving local authority for this regulation under the MPA.

"All on-site utilities shall be installed underground." Utility construction requirements are preempted either by the PUC for utility-owned utilities, and/or by Title 25, CCR, which permits overhead utilities. New parks built after 1997 must have gas and electric services owned, operated, and maintained by the serving utility. See, Public Utilities Code section. 2791, Title 25 CCR, section 1180(g).

"Prior to final approval of a park conversion, all lots shall be surveyed to be equal in size, clearly demarcated by landscaping, and lot lines approved by the Planning Department shall be recorded with the County Recorder." A mobilehome park remains a mobilehome park before, during, and after conversion; see, H&SC section 18214, subdivision (a), which provides, ""Mobilehome park" is any area or tract of land where two or more lots are rented or leased, held out for rent or lease, or were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership..." (emphasis added) Thus, the preemptive provisions which applied to a park prior to, during, and after conversion. The establishment, marking, and movement of lot lines are governed by Title 25, CCR, sections 1104, 1105, 1330, and 1428. Landscaping is not a proper form of lot marking, and lot lines must either be those in existence or moved and approved pursuant to CCR section 1105. A local government may require that the final approved lot lines be those consistent with the requirements of Title 25, since the local government has the authority to approve final lot lines as part of a subdivision approval; however, their location and marking must be consistent with Title 25.

Conclusion

The State Legislature, in its enactment and subsequent amendments to the Mobilehome Parks Act and the Special Occupancy Parks Act, has established clear preemptive authority with regard to state regulation of the physical construction and operational standards for mobilehome parks and recreational vehicle parks. Conversely, both expressly and impliedly, the Legislature has narrowly limited local government authority to legislatively mandate any activity or requirements with regard to the physical standards, physical operation, or physical status of a park. A number of local ordinances addressing park standards for construction, maintenance, operations, or conversions to subdivisions or other forms of resident ownership likely are invalid because the two state Acts preempt them.

If you have any questions regarding this memorandum, please feel free to contact our office at the address above.

Sincerely,

Kim Strange
Deputy Director

Exhibit 15

STATE OF CALIFORNIA -BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF CODES AND STANDARDS
1800 Third Street, Room, 260, P.O. Box 1407
Sacramento, CA 95812-1407
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www.hcd.ca.gov

ORIGINAL SENT BY ELECTRONIC MAIL

March 26, 2009

L. Sue Loftin, Esq.
The Loftin Firm
5760 Fleet Street, Ste. 110
Carlsbad, California 92008

Re: City of San Clemente ("City")
Response to Appeal from MPA Enforcement Decision by City
Capistrano Shores MHP, 1800 No. El Camino Real, San Clemente 92672

Dear Ms. Loftin:

The Department of Housing and Community Development (the Department) is in receipt of your correspondence dated September 25, 2008. I understand that you have been in communication with our legal counsel, Ms. Lisa Campbell, who explained the reasons for the delay in responding to you in this matter. I apologize for the delay and hope that it did not create any unreasonable hardship for your clients.

Your letter requests an Appeal from the enforcement decision of the City of San Clemente (the Local Enforcement Agency for the Mobilehome Parks Act) wherein the City denied an application to replace an existing, old mobilehome with a new 2-story manufactured home. In your Appeal you have requested that the Department issue an order or take other similar action instructing the City to either 1) Approve the Application as submitted, and/or 2) Relinquish the City's authority to act as the regulatory agent under the MPA. In an effort to arrive at the correct method of action the Department has conducted an extensive and thorough review of your request and all of the issues involved in this matter.

The Department, after extensive and thorough review of the laws in this matter has concluded that the City of San Clemente's local ordinance implementing the nonconforming use status of the park by regulating activity within the park is preempted by the Mobilehome Parks Act and the Manufactured Housing Act. This preemption precludes the local government from exercising any regulatory authority over repairs, replacement and other physical activity within the park.

I am including with this correspondence the Department's legal opinion in this matter in support of the Department's position, and providing a copy to the City for its

consideration. However, given our belief that the City's denial of the approval was based on a good faith misinterpretation of the applicable laws, I will not, at this time, address the potential administrative or judicial remedies applicable to noncompliance with the Mobilehome Parks Act by a local enforcement agency. It is our expectation that, upon review of the enclosed opinion, the City will comply with the applicable laws.

Thank you again for your time and attention in this matter.

Sincerely,

Kim Strange
Deputy Director

Enclosure

cc: Ronald Javor, Asst. Deputy Director
Lisa R. Campbell, Sr. Staff Counsel
Jeff Oderman, San Clemente City Attorney
Noam Duzman, Deputy City Attorney
George Scarborough, City Manager

Exhibit 16

Lexis Advance

127 cal app 4th 1483

County of Santa Cruz v. Waterhouse, 127 Cal. App. 4th 1483 (Copy citation)

Court of Appeal of California, Sixth Appellate District
March 30, 2005, Filed
H024127

Reporter: 127 Cal. App. 4th 1483 | 26 Cal. Rptr. 3d 543 | 2005 Cal. App. LEXIS 509 | 2005 Cal. Daily Op. Service 2813 | 2005 Daily Journal DAR 3787

COUNTY OF SANTA CRUZ, Plaintiff and Appellant, v. KENNETH WATERHOUSE et al., Defendants and Respondents.

Notice: As modified Apr. 28, 2005.

Subsequent History: Modified and rehearing denied by County of Santa Cruz v. Waterhouse, 2005 Cal. App. LEXIS 679 (Cal. App. 6th Dist., Apr. 28, 2005)
Review denied by County of Santa Cruz v. Waterhouse, 2005 Cal. LEXIS 7124 (Cal., June 29, 2005)

Prior History: Superior Court of Santa Cruz County, No. CV141653, Richard McAdams, Judge.

Disposition: Affirmed.

Core Terms

mobile home, mobile home park, install, ordinance, height, zoning, lot line, preempt, density, local ordinance, local regulation, state law, occupation, authority to regulate, local authority, preemption, city and county, triple-wide, permanent, subject matter, state concern, fully occupy, double-wide, occupy, construction standards

Case Summary

Procedural Posture
Plaintiff county sought injunctive and declaratory relief against defendant mobilehome park operator for its plan to install a two-story mobilehome without the county's express approval. The Santa Cruz County Superior Court, California, denied relief, finding that the county's ordinance requiring local approval for the installation of two-story mobilehomes was preempted by the California Mobilehome Parks Act (MPA). The county appealed.

Overview
Agreeing with the trial court, the instant court held that the MPA preempted the ordinance. The legislature's goal of promoting uniformity in mobilehome construction and installation standards demonstrated that the state fully occupied the area of mobilehome regulation. The legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions of where a mobilehome park could be located, vehicle parking, and lot lines, not the structures within the parks. Although the MPA granted authority to the county to regulate the number of cars that could be parked for each mobilehome unit, it provided no authority for the county to regulate installation of a two-story unit. With respect to Cal. Health & Safety Code § 18611 and its reference to the height of mobilehomes, the instant court concluded that the statute was inapplicable. By its terms, § 18611 was limited to mobilehomes that were affixed to permanent foundations and located in parks where the permit to construct the park was issued on or after January 1, 1982. This case did not involve a mobile home affixed to a permanent foundation, and the operator was issued its permit in 1962.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes - Hide

Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law
Governments > State & Territorial Governments > Relations With Governments

HN1 Where the question presented in a case is whether state law preempts a local ordinance, it is a pure question of law subject to de novo review. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Governments > Local Governments > Police Power
Governments > Police Powers

HN2 The California Constitution provides counties general police power to enact ordinances and regulations deemed necessary to protect the public health. Cal. Const. art. XI, § 7. Such ordinances and regulations prevail over all state laws other than those that specifically address matters of statewide concern. Cal. Const. art. XI, § 5. *Shepardize* - Narrow by this Headnote

Governments > Legislation > Types of Statutes
Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments

HN3 A local ordinance will be preempted if it conflicts with state law, and a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Full occupation of the field is demonstrated by the legislature's express manifestation of its intent to occupy the field, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Construction & Development
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation
Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues

HN4 The California Mobilehome Parks Act (MPA), which is embodied in Cal. Health & Safety Code § 18300 et seq., provides for the regulation of mobilehome construction and installation in California. The MPA clearly expresses that it is California state policy to ensure that mobilehome parks are operated to assure the health, safety, general welfare, and decent living environment of the residents, as well as protect the investment value of mobilehomes. Cal. Health & Safety Code § 18250. The MPA's goals of promoting the health and safety of mobilehome residents are implemented through the California Department of Housing and Community Development's establishment of standards for construction, maintenance, occupancy, use, and design of parks. Cal. Health & Safety Code § 18251. The MPA mandates that these standards, found in Cal. Code Regs. tit. 25, § 1000 et seq., should be flexible enough to accommodate new technologies and to allow designs that reduce costs and enhance the living environment of park residents. Cal. Health & Safety Code § 18251. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN5 See Cal. Health & Safety Code § 18300(a). *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Police Power
Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues

HN6 With respect to preemption of local laws by the California Mobilehome Parks Act (MPA), Cal. Health & Safety Code § 18300 et seq., despite the fact that the State of California fully occupies the field of mobilehome regulation in the state, and the MPA's clear statement of its preemption of local laws that attempt to regulate mobilehomes, the MPA also provides for exceptions for local regulation. The specific exceptions to the general preemption provision found in Cal. Health & Safety Code § 18300(a) are stated in § 18300(g)(1), (5). The exceptions specifically provide for local regulation of zoning and lot lines for mobilehome parks, and not the height of mobilehomes within their confines. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Police Power
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN7 See Cal. Health & Safety Code § 18300(g)(1), (5). *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation
Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues
Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions
Real Property Law > Subdivisions > Local Regulations

HN8 Under Cal. Health & Safety Code § 18300(g)(1), (5), a county is conferred the power to regulate the location of mobilehome parks, lot lines within the parks, and the usage for the parks (e.g., senior or family mobilehome parks). There is nothing stated in the sections providing the county authority to regulate the structure of the mobilehome units within the parks. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation
Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions
Real Property Law > Subdivisions > Local Regulations
Real Property Law > Zoning > [redacted] Ordinances
Transportation Law > Bridges & Roads > Billboards
Transportation Law > ... > Traffic Regulation > Parking > General Overview
Transportation Law > ... > Traffic Regulation > Parking > Parking Facilities

HN9 With respect to preemption of local laws by the California Mobilehome Parks Act, Cal. Health & Safety Code § 18300 et seq., it is clear that the California Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions of where a mobilehome park may be located, vehicle parking and lot lines, not the structures within the parks. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation

HN10 Cal. Health & Safety Code § 18300 (g)(1)'s grant of authority to counties to regulate the number of cars that may be parked for each mobilehome unit in no way implicates authority to regulate whether a two-story mobilehome may be installed. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Charters
Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN11 See Cal. Health & Safety Code § 18300(h)(1). *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation

HN12 Cal. Health & Safety Code § 18300(h), which regulates mobilehome park density, only applies to new parks. Section 18300(h) is a limitation on a county's ability to regulate zoning, not a grant of authority. As such, it does not provide the county with authority to regulate the height of mobilehomes. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation
Real Property Law > Mobilehomes & Mobilehome Parks > Subdivisions
Transportation Law > ... > Traffic Regulation > Parking > General Overview

HN13 A locality may regulate mobilehome park density by limiting the number of units or spaces per acre when it initially approves the zoning of the new park, by establishing the number of lots and the specific lot lines. Cal. Health & Safety Code §§ 18300.1, 18300(g)(5). However, the ability to regulate density and lot lines is limited by Cal. Health & Safety Code § 18300(h), which requires that the density for a mobilehome park be no less than surrounding residential zoning. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Construction & Development
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation
Transportation Law > ... > Traffic Regulation > Parking > General Overview

HN14 If a double-wide or triple-wide mobilehome is built according to the California Mobilehome Parks Act (MPA), Cal. Health & Safety Code § 18300 et seq., and federal construction standards and it is being installed within the lot line requirements for the park, a locality cannot prevent its installation. Similarly, a two-story mobilehome, if it meets the construction standards, can be installed in a mobilehome park, provided it meets the lot line requirements. The MPA provides no authority to localities to regulate whether or not a double-wide or triple-wide is installed in its parks. Similarly, there is no authority to regulate whether a two-story unit is installed. *Shepardize* - Narrow by this Headnote

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Construction & Development
Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation

HN15 See Cal. Health & Safety Code § 18611. *Shepardize* - Narrow by this Headnote

Governments > State & Territorial Governments > Relations With Governments
Real Property Law > Mobilehomes & Mobilehome Parks > General Overview
Real Property Law > Mobilehomes & Mobilehome Parks > Construction & Development

HN16 There is nothing in Cal. Health & Safety Code § 18611 that grants local authority to regulate the height of mobilehomes. By its own terms, § 18611 is limited to those mobilehomes that are: (1) affixed to permanent foundations; and (2) located in parks where the permit to construct the park is issued on or after January 1, 1982. *Shepardize* - Narrow by this Headnote

Headnotes/Syllabus -Hide

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Santa Cruz County filed an action in the superior court requesting injunctive and declaratory relief against a mobilehome park operator for its plan to install a two-story mobilehome without the county's express approval. The trial court denied the county's request for a permanent injunction and declaratory relief, finding that the county's ordinance requiring local approval for the installation of two-story mobilehomes was preempted by the Mobilehome Parks Act (MPA), Health & Saf. Code, § 18300 et seq. (Superior Court of Santa Cruz County, No. CV141653, Richard J. McAdams, Judge.)

The Court of Appeal affirmed. The court held that the MPA preempted the ordinance. The Legislature's goal of promoting uniformity in mobilehome construction and installation standards demonstrated that the state fully occupied the area of mobilehome regulation. The Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions of the location of the mobilehome park, vehicle parking, and lot lines, and not extend it to regulation of the structures within the park. Although the MPA grants authority to the county to regulate the number of cars that may be parked for each mobilehome unit, it provides no authority for the county to regulate installation of a two-story unit. With respect to Health & Saf. Code, § 18611, and its reference to the height of mobilehomes, the court concluded that the statute was inapplicable. By its terms, § 18611 is limited to mobilehomes that are affixed to permanent foundations and located in parks where the permit to construct the park is issued on or after January 1, 1982. The case did not involve a mobilehome affixed to a permanent foundation, and the operator was issued its permit in 1962. (Opinion by Rushing, P. J., with Premo and Elia, JJ., concurring.) **[1484]**

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

CA(1) (1)
Appellate Review § 145 > Questions of Law and Fact > Preemption of Local Ordinance > De Novo Review.

Where the question presented in a case is whether state law preempts a local ordinance, it is a pure question of law subject to de novo review.

CA(2) (2)
Counties § 10 > Ordinances > Protection of Public Health > Preemption > Matters of Statewide Concern.

Under Cal. Const., art. XI, § 7, counties are provided general police power to enact ordinances and regulations deemed necessary to protect the public health. Under Cal. Const., art. XI, § 5, such ordinances and regulations prevail over all state laws other than those that specifically address matters of statewide concern.

CA(3) (3)
Counties § 10 > Ordinances > Preemption > Conflict with State Law > Area Fully Occupied by General Law.

A local ordinance will be preempted if it conflicts with state law, and a conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Full occupation of the field is demonstrated by the Legislature's express manifestation of its intent to occupy the field, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

CA(4) (4)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Construction and Installation > Health & Safety of Residents > Protection of Investment Value.

The Mobilehome Parks Act (MPA), Health & Saf. Code, § 18300 et seq., provides for the regulation of mobilehome construction and installation. Under Health & Saf. Code, § 18250, it is state policy to ensure that mobilehome parks are operated **[1485]** to assure the health, safety, general welfare, and decent living environment of the residents, as well as protect the investment value of mobilehomes. The MPA's goals of promoting the health and safety of mobilehome residents are implemented through the Department of Housing and Community Development's establishment of standards required by Health & Saf. Code, § 18251, for the construction, maintenance, occupancy, use, and design of parks. Under § 18251, the MPA mandates that these standards, found in Cal. Code Regs., tit. 25, § 1000 et seq., should be flexible enough to accommodate new technologies and to allow designs that reduce costs and enhance the living environment of park residents.

CA(5) (5)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Law > Exceptions > Regulation of Zoning and Lot Lines Permitted.

With respect to preemption of local laws by the Mobilehome Parks Act (MPA), Health & Saf. Code, § 18300 et seq., despite the fact that the state fully occupies the field of mobilehome regulation in the state, and the MPA's clear statement of its preemption of local laws that attempt to regulate mobilehomes, the MPA also provides for exceptions for local regulation. The specific exceptions to the general preemption provision found in Health & Saf. Code, § 18300, subd. (a), are stated in § 18300, subd. (g)(1), (5). The exceptions specifically provide for local regulation of zoning and lot lines for mobilehome parks, and not the height of mobilehomes within their confines.

CA(6) (6)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Law > Exceptions > Regulation of Zoning and Lot Lines Permitted.

Under Health & Saf. Code, § 18300, subd. (g)(1), (5), a county is conferred the power to regulate the location of mobilehome parks, lot lines within the parks, and the usage for the parks (e.g., senior or family mobilehome parks). There is nothing stated in the sections providing the county authority to regulate the structure of the mobilehome units within the parks.

CA(7) (7)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Law > Exceptions > Regulation of Structures Not Permitted.

With respect to preemption of local laws by the Mobilehome Parks Act, Health & Saf. Code, § 18300 et seq., it is clear that the Legislature intended to limit local authority for zoning **[1486]** regulation to the specifically enumerated exceptions of where a mobilehome park may be located, vehicle parking and lot lines, not the structures within the parks.

CA(8) (8)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Laws > Exceptions > Vehicle Parking.

Health & Saf. Code, § 18300, subd. (g)(1)'s grant of authority to counties to regulate the number of cars that may be parked for each mobilehome unit in no way implicates authority to regulate whether a two-story mobilehome may be installed.

CA(9) (9)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Laws > Exceptions > Density.

Health & Saf. Code, § 18300, subd. (h), which regulates mobilehome park density, only applies to new parks. Section 18300, subd. (h), is a limitation on a county's ability to regulate zoning, not a grant of authority. As such, it does not provide the county with authority to regulate the height of mobilehomes.

CA(10) (10)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Laws > Exceptions > Density.

Under Health & Saf. Code, §§ 18300.1 and 18300, subd. (g)(5), a locality may regulate mobilehome park density by limiting the number of units or spaces per acre when it initially approves the zoning of the new park, by establishing the number of lots and the specific lot lines. However, the ability to regulate density and lot lines is limited by Health & Saf. Code, § 18300, subd. (h), which requires that the density for a mobilehome park be no less than surrounding residential zoning.

CA(11) (11)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Mobilehome Parks Act > Preemption of Local Laws > Installation of Two-story Unit.

The Mobilehome Parks Act, Health & Saf. Code, § 18300 et seq., provided no authority to a county to regulate whether a mobilehome park operator could install a two-story unit.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 527; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 797, 852.]

CA(12) (12)
Mobilehomes, Trailers, and Parks § 3 > Regulation > Height of Mobilehomes.

There is nothing in Health & Saf. Code, § 18611, that grants local authority to regulate the height of mobilehomes. By its own terms, § 18611 is limited to those mobilehomes that are: (1) affixed to permanent foundations; and (2) located in parks where the permit to construct the park is issued on or after January 1, 1982.

Counsel: Dana McRae and Dwight L. Herr, County Counsel, for Plaintiff and Appellant.

Law Office of Spangenberg & Ritson, David Spangenberg and Lark L. Ritson for Defendant and Respondent Kenneth Waterhouse et al.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, John Davidson and Mark William Poole, Deputy Attorneys General, for Defendants and Respondents California Department of Housing & Community Development.

Judges: Rushing, P. J., with Premo and Elia, JJ., concurring.

Opinion by: RUSHING

Opinion

RUSHING, P. J.—

Statement of the Facts and Case

Yacht Harbor Manor Mobilehome Park is owned and operated by defendants and respondents Kenneth Waterhouse and Waterhouse Corporation (Waterhouse).

Pursuant to the California Mobilehome Parks Act (MPA), which vests the power to issue permits for the installation of mobilehomes in California with the California Department of Housing and Community Development (HCD), Waterhouse applied for a permit to install a two-story mobilehome in the Yacht Harbor Manor Mobilehome Park. HCD initially rejected the application because it was incomplete, but subsequently issued the permit in August 2001.

Prior to HCD issuing the permit to Waterhouse, in June 2001, plaintiff and appellant County of Santa Cruz (the County) adopted an interim ordinance, which prohibits mobilehomes within mobilehome parks from exceeding one story or 17 feet in height unless the County grants an exception.

The County filed an action in superior court requesting injunctive and declaratory relief against Waterhouse for its plan to install the two-story mobilehome without the County's express approval. The case was submitted by stipulation of the parties on the basis of briefs, requests for judicial notice, **[1488]** stipulation of fact and oral argument. The court denied the County's request for a permanent injunction and declaratory relief, and held the County's ordinance requiring local approval for the installation of two-story mobilehomes was preempted by the MPA.

The County filed a timely notice of appeal.

Discussion

The issue presented by this appeal is whether the MPA preempts a county ordinance requiring local planning approval for the installation of multistory mobilehomes.

CA(1) (1) ***HN1*** Because the question presented in this case is whether state law preempts a local ordinance, it is a pure question of law subject to de novo review. (*Roble Vista Associates v. Bacon* (2002) 97 Cal.App.4th 335, 339 [118 Cal. Rptr. 2d 295].)

Santa Cruz County Ordinance No. 4628

CA(2) (2) ***HN2*** The California Constitution provides counties such as Santa Cruz general police power to enact ordinances and regulations deemed necessary to protect the public health. (Cal. Const., art. XI, § 7.) Such ordinances and regulations prevail over all state laws other than those that specifically address matters of statewide concern. (Cal. Const., art. XI, § 5.)

In that vein, and in order to address the issue of multistory mobilehomes, County adopted Santa Cruz Ordinance No. 4628 (Ordinance No. 4628), which prohibits mobilehomes within mobilehome parks from exceeding one story or 17 feet in height unless the County grants an exception. Specifically, the ordinance provides: "existing mobile home parks shall be subject to the restriction that an individual

mobile home or accessory building shall not exceed one story or seventeen (17) feet in height unless an exception is granted pursuant to subdivision (f) of Section 13.10.684." (Santa Cruz County Code, § 13.10.458.)

Validity of Ordinance No. 4628

CA(3) (3) The question of whether Ordinance No. 4628 is valid depends on whether state law preempts it. The California Supreme Court in *Sherwin Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 [16 Cal. Rptr. 2d 215, **[1489]** 844 P.2d 534] set forth the standard for determining if a state law preempts a local ordinance. ***HN3*** A local ordinance will be preempted if it conflicts with state law, and a conflict exists if the local legislation " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.]" (*Id.* at p. 897.) Full occupation of the field is demonstrated by the Legislature's express manifestation of its intent to occupy the field, or "when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality. [Citations.]" (*Id.* at p. 898.)

The Mobilehome Parks Act

CA(4) (4) Here, the state law at issue is ***HN4*** the MPA, which is embodied in Health and Safety Code section 18300 et seq., [1] and provides for the regulation of mobilehome construction and installation in California. The MPA clearly expresses that it is California state policy to ensure that mobilehome parks are operated to assure the "health, safety, general welfare, and ... decent living environment" of the residents, as well as protect the investment value of mobilehomes. (§ 18250.) The MPA's goals of promoting the health and safety of mobilehome residents are implemented through the HCD's establishment of standards for "construction, maintenance, occupancy, use, and design of ... parks." (§ 18251.) The MPA mandates that these standards, found in the California Code of Regulations, title 25, section 1000 et seq., "should be flexible enough to accommodate new technologies and to allow designs that reduce costs and enhance the living environment of park residents." (§ 18251; see §§ 18253, 18610.)

The Legislature's goal of promoting uniformity in mobilehome construction and installation standards impliedly demonstrates that California fully occupies the area of mobilehome regulation. Indeed, the goal of uniformity can only be achieved through occupation of the field, alleviating variances in local regulation. The MPA's purpose of protecting the health and welfare of **[1490]** the residents of mobilehome parks, as well as the investment value of mobilehomes, can only be achieved through the centralized regulatory power of the HCD. Without such centralized regulation, mobilehome owners would be subject to the specific and particularized whims of a local county or municipality, and would in effect be hampered in his or her ability to move the mobilehome within the state. [2] This result is clearly what the Legislature intended to prevent with the enactment of the MPA.

In addition to the Legislative goals of the MPA impliedly demonstrating full occupation of the field, the Legislature expressly states its intent that the MPA preempt local regulation. Importantly, the outset of section 18300 contains language that the MPA "supercedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to this part." (§ 18300, subd. (a).) However, the preemption language in section 18300 has changed through amendment in recent years. In its previous wording, section 18010 (the predecessor to section 18300) allowed local regulation in "areas which, although not specifically excepted, are not covered by the 80 sections of said part." Section 18010 as it existed in 1963 provided, in relevant part: "The provisions of this part apply to all parts of the State and supercede any ordinance enacted by any city, county, or city and county applicable to the provisions of this part." (Added by Stats. 1961, ch. 2176, § 2, p. 4503.)

In its 1963 analysis of the MPA, the Attorney General concluded that the State did not fully occupy the field of mobilehome regulation, stating that had the section read "applicable to this part," rather than " 'applicable to the provisions of this part,' " " 'the [state's] occupation of the field ... would be clear.' " (41 Ops.Cal.Atty.Gen., *supra*, at p. 32, italics omitted.)

Currently, section 18300 reads: "***HN5*** this part applies to all parts of the state and supercedes any ordinance enacted by any city, county, or city and county, whether general law or chartered, *applicable to this part.*" (§ 18300, subd. (a), italics added.) The state makes much of the fact that this change in the legislation occurred after the Attorney General's opinion, arguing that the amendment was in response to the opinion and demonstrated the state's intent to occupy the field. The County is quick to point out, however, the amendment **[1491]** was made in 1985, over 22 years after the Attorney General's opinion, and was part of "clean-up" legislation, not a substantive change in the MPA to indicate the state's intent to occupy the field.

Regardless of the parties' position on the timing of the amendment of the MPA and whether it was in fact in response to the Attorney General's opinion, it is unmistakable that the MPA now clearly states: "applicable to this part." The Attorney General's opinion that the phrase: "applicable to this part," demonstrates the state's intent to occupy the field is as true today as it was in 1963. It is immaterial that the amendment occurred 22 years after the opinion, and as part of clean-up legislation; the language clearly demonstrates the state's intent to occupy the field of mobilehome regulation in California.

Case Law in California Dealing with the MPA

On the issue of preemption, there is very little case law in California that addresses the MPA. The few cases that do address section 18300 do so in a limited way, and do not support the County's position that it has the authority to regulate the height of mobilehomes. *Watson v. County of Merced* (1969) 274 Cal. App. 2d 263 [78 Cal. Rptr. 807], and *Lagrutta v. City Council* (1970) 9 Cal. App. 3d 890 [96 Cal. Rptr. 627], both cited by the County in support of its position that it may regulate the height of mobilehomes, are distinguishable from the present case. In *Watson*, the court considered whether the MPA preempted a local ordinance that imposed a license fee on mobilehomes outside of mobilehome parks. The court concluded that because former section 18300, subdivision (c) allowed for local exercise of power to require permits outside mobilehome parks, the local ordinance was valid and not preempted. (*Watson v. County of Merced, supra*, 274 Cal. App. 2d at p. 265.)

The *Lagrutta* case dealt with a similar issue. In *Lagrutta* , the court considered whether a city could deny the issuance of a special use permit for a mobilehome park in the City of Stockton. The court cited *Watson* in support of its holding that the city had power to make zoning decisions based on the language of former section 18300, subdivision (a). (*Lagrutta v. City Council, supra*, 9 Cal. App. 3d at p. 893.)

Both *Watson* and *Lagrutta* are inapplicable to the present case. In both, the courts determined that the local ordinance in place was not preempted by the MPA; however, important to both cases' analyses was the fact that the MPA specifically provided for local authority to enact the legislation at issue in the **[1492]** cases. Here, there is no such specific provision in the MPA providing local authority to enact legislation regulating the construction of mobilehomes.

Similarly, *Griffith v. County of Santa Cruz* (2000) 79 Cal.App.4th 1318 [94 Cal. Rptr. 2d 801] does not support the County's position in this case, and is distinguishable. In *Griffith*, a panel of this court considered whether the County of Santa Cruz could impose its rent control ordinance on mobilehome parks, or whether it was preempted by the MPA. This court held that the MPA governs the construction, maintenance, use and operation of mobilehome parks, but does not specifically regulate tenancies. Additionally, this court noted that the Mobilehome Residency Law (Civ. Code, § 798 et seq.) and the Recreational Vehicle Park Occupancy Law (Civ. Code, § 799.20 et seq.) regulate mobilehome and recreational vehicle tenancies, and landlord-tenant relationships. (*Griffith v. County of Santa Cruz, supra*, 79 Cal.App.4th at pp. 1322–1323.) This court concluded that because neither of the tenancy related statutes specifically preempted local rent controls of mobilehomes, the local ordinance was valid. (*Ibid.*) *Griffith* does not support the County's position in this case.

Exceptions to Preemption in the MPA for Zoning and Lot Lines

CA(5) (5) ***HN6*** Despite the fact that the State fully occupies the field of mobilehome regulation in California, and the MPA's clear statement of its preemption of local laws that attempt to regulate mobilehomes, the MPA also provides for exceptions for local regulation. The specific exceptions to the general preemption provision found in section 18300, subdivision (a) are stated in section 18300, subdivision (g)(1) and (5) as follows: ***HN7***

"(g) This part shall not prevent local authorities of any city, county, or city and county, within the reasonable exercise of their police powers, from doing any of the following:

"(1) From establishing, subject to the requirements of Sections 65852.3 and 65852.7 of the Government Code, certain zones for manufactured homes, mobilehomes, mobilehome parks within the city, county, or city and county, or establishing types of uses and locations, including family mobilehome parks, senior mobilehome parks, mobilehome condominiums, mobilehome subdivisions, or mobilehome planned unit developments within the city, county, or city and county, as defined in the zoning ordinance, or from adopting rules and regulations by ordinance or resolution prescribing park perimeters walls or enclosures on public street frontage, signs, access, and vehicle parking or from prescribing the prohibition of certain uses for mobilehome parks. [¶] ... [¶]

"(5) From authorizing the creation, movement, shifting, or alteration of mobilehome park lot lines as specified in Section 18610.5."

[1493] ***CA(6)*** (6) The exceptions stated above specifically provide for local regulation of zoning and lot lines for mobilehome parks, and not the height of mobilehomes within their confines. Therefore, the question is whether the exceptions for regulation of zoning and lot lines include the power to regulate the height of mobilehomes. The County asserts that it can limit the height of mobilehomes based on the zoning authority in section 18300, subdivision (g)(1), and the creation and movement of mobilehome park lot lines in section 18300, subdivision (g)(5). However, ***HN8*** these sections confer upon the County the power to regulate the location of mobilehome parks, lot lines within the parks, and the usage for the parks (e.g., senior or family mobilehome parks). There is nothing stated in the sections providing the County authority to regulate the structure of the mobilehome units within the parks.

CA(7) (7) In support of its position that the zoning exception in the MPA provides it authority to regulate the height of mobilehomes, the County argues that the land use regulations of Government Code section 65800 et seq. referenced in section 18300, subdivision (g) allow for local regulation of the height of mobilehomes. Specifically, Government Code section 65850 authorizes localities to enact zoning ordinances, and ordinances regarding signs and billboards, lot size, yard and open space, and parking. The County asserts that these provisions give it the authority to regulate the height of mobilehomes within its confines. How ever, when compared to the provisions of section 18300, ***HN9*** it is clear that the Legislature intended to limit local authority for zoning regulation to the specifically enumerated exceptions of *where* a mobilehome park may be located, vehicle parking, and lot lines, not the structures within the parks.

Parking and Density Provisions in the MPA

CA(8) (8) The County additionally asserts that the parking provisions in section 18300, subdivision (g)(1) provide local authority to regulate the height of mobilehomes. However, ***HN10*** section 18300, subdivision (g)(1)'s grant of authority to counties to regulate the number of cars that may be parked for each mobilehome unit in no way implicates authority to regulate whether a two-story mobilehome may be installed. Moreover, it is undisputed in this case that Waterhouse complied with all county regulations regarding two parking places per mobilehome unit.

Finally, the County asserts that the MPA's provisions regarding regulation of density demonstrate that the ordinance in this case is valid. Specifically, section 18300, subdivision (h)(1) provides: ***HN11*** "A city, including a charter city, county or city and county, shall not require the average density in a new

park plan to be less than that permitted by the applicable zoning ordinance, plus any density bonus, as defined in Section 65915 of the Government Code, for other affordable housing forms."

[1494] ***CA(9)*** (9) It is important to note that, on its face, ***HN12*** section 18300, subdivision (h) only applies to new parks; Waterhouse was originally issued its permit in 1962, making this section inapplicable. More important, however, is the fact that section 18300, subdivision (h) is a *limitation* on the County's ability to regulate zoning, not a grant of authority. As such, it does not provide the County with authority to regulate the height of mobilehomes.

CA(10) (10) Additionally, ***HN13*** a locality may regulate density by limiting the number of units or spaces per acre when it initially approves the zoning of the new park, by establishing the number of lots and the specific lot lines. (§§ 18300.1, 18300, subd. (g)(5).) However, the ability to regulate density and lot lines is limited by the provision of section 18300, subdivision (h), which requires that the density for a mobilehome park be no less than surrounding residential zoning.

CA(11) (11) With regard to the argument that the zoning, lot line and density provisions of the MPA provide the County with the authority to regulate the height of mobilehomes, we see no difference between the installation of a two-story mobilehome and a double- or triple-wide mobilehome under the MPA. The County attempts to use the installation of double-wide and triple-wide mobilehome units as support for its position that it may regulate the height of mobilehomes, stating: "If a double-wide or triple-wide mobilehome does not fit within the existing lot lines and meet the required setbacks, it cannot be installed." The County goes on to argue by analogy that just because a two-story unit meets the federal and state construction standards, it does not necessarily mean it can be installed in any lot in a particular park. These arguments are correct, as far as they go. What is not stated, however, is the fact that ***HN14*** if a double-wide or triple-wide mobilehome is built according to the MPA and federal construction standards and it is being installed within the lot line requirements for the park, a locality cannot prevent its installation. Similarly, a two-story mobilehome, if it meets the construction standards, can be installed in a mobilehome park, provided it meets the lot line requirements. The MPA provides no authority to localities to regulate whether or not a double-wide or triple-wide is installed in its parks. Similarly, there is no authority to regulate whether a two-story unit is installed.

The MPA's Section 18611 and its Reference to the Height of Mobilehomes

There is only one specific reference to the height of mobilehomes in the MPA. That reference is found in section 18611, and provides: ***HN15*** "(a) Factory-built housing ... , mobilehomes as defined in Section 18008, or multiunit manufactured housing as defined in Section 18008.7 may be affixed to a foundation system within a mobilehome park, if the installation conforms to the rules of the mobilehome park, the installation is approved pursuant to **[1495]** Section 19992, or in the case of manufactured homes, mobilehomes, or multiunit manufactured housing the installation is in accordance with Section 18551, and no single structure exceeds two stories in height. ...

"(b) This section applies only to mobilehome parks (1) where the permit to construct the park is issued on or after January 1, 1982, and (2) that are additionally granted a zone designation or conditional use permit that authorizes permanent occupancies of the type and to the extent established pursuant to this section."

CA(12) (12) ***HN16*** There is nothing in section 18611 that grants local authority to regulate the height of mobilehomes. By its own terms, section 18611 is limited to those mobilehomes that are (1) affixed to permanent foundations; and (2) located in parks "where the permit to construct the park is issued on or after January 1, 1982." (§ 18611.) This case does not involve a mobilehome affixed to a permanent foundation, and Waterhouse was issued its permit in 1962, making section 18611 inapplicable.

However, even if this case did involve an application for a two-story mobilehome on a permanent foundation, and we were to ignore the express language regarding the limitation to parks permitted after 1982, section 18611 does not allow local government to prevent the installation of a two-story mobilehome. If the mobilehome park is zoned by the county to provide for permanent foundations, section 18611 specifically allows the installation of a two-story mobilehome; local government cannot prevent its installation.

Conclusion

We conclude based on the specific language of section 18300 et seq., including the provisions that specifically state that the MPA preempts local legislation, as well as those provisions that allow limited local regulation, that the MPA preempts the ordinance in this case. The Legislature's goal of promoting uniformity in mobilehome construction and installation standards can only be achieved through centralized regulation of the MPA, alleviating variances in local regulation. Without such centralized regulation, a mobilehome owner would be subject to the specific and particularized whims of a local county or municipality, and would in effect be hampered in his or her ability to move the mobilehome within the state.

[1496] Disposition

The judgment of the trial court is affirmed.

Premo, J., and Elia, J., concurred.

A petition for a rehearing was denied April 28, 2005, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied June 29, 2005. Brown, J., did not participate therein.

Footnote 1

All further statutory references are to the Health and Safety Code.

Footnote 2

Our view of the importance of centralization of mobilehome regulation is supported by the Attorney General's analysis of the MPA prepared in 1963. In that analysis, the Attorney General states: "it would be an unreasonable burden upon owners or users of mobilehomes if extensive changes would have to be made in a mobilehome when it was taken to another city or county." (41 Ops.Cal.Atty.Gen. 28, 31 (1963).)

Exhibit 17

750f supp2d 1061

Gonzalez v. Drew Indus., 750 F. Supp. 2d 1061 (Copy citation)

United States District Court for the Central District of California
May 10, 2007, Decided ; May 10, 2007, Filed; May 14, 2007 Entered
Case No. CV 06-08233 DDP (JWJx)

Reporter: 750 F. Supp. 2d 1061 | 2007 U.S. Dist. LEXIS 35952

VICTORIA GONZALEZ, on behalf of herself and all others similarly situated, Plaintiff, v. DREW INDUSTRIES INC., a Delaware corporation; KINRO, INC., an Ohio corporation; KINRO TEXAS LIMITED PARTNERSHIP, a Texas limited partnership, d/b/a BETTER BATH COMPONENTS; and SKYLINE CORPORATION, an Indiana corporation, Defendants.

Subsequent History: Summary judgment granted by, Motion denied by, As moot Gonzalez v. Drew Indus., 2010 U.S. Dist. LEXIS 105470 (C.D. Cal., Sept. 30, 2010)

Core Terms

manufactured home, preemption, state law, federal standard, preempt, warranty, manufacturer, consumer, bathtub, saving clause, exempt, manufactured housing, federal law, notice, safety standards, cure, implied warranty, real property, conflict preemption, motion to dismiss, plaintiff's claim, express warranty, cause of action, mobile home, pre-empt, privity, flammability, flame, contractual, advertize

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Judges: DEAN D. PREGERSON, United States District Judge.

Opinion by: DEAN D. PREGERSON

Opinion

[1062] ORDER DENYING MOTION TO DISMISS

[Motion filed on March 23, 2007; Motion for Joinder filed March 23, 2007]

This matter comes before the Court on defendants' motion to dismiss the First Amended Complaint ("FAC") for failure to **[1063]** state a claim upon which relief can be granted. After reviewing the materials submitted by the parties and considering all the arguments therein, the Court denies the motion and adopt the following order.

I. BACKGROUND

A. Factual History

In November 2005, Victoria Gonzalez, the plaintiff, purchased a manufactured home produced by defendants Skyline Corporation and Skyline Homes. (FAC, P 26.) The home featured a bathtub made of ABS plastic produced by defendants Kinro, Inc., Kinro Texas Limited Partnership, and their parent company, Drew Industries, under the brand name "Better Bath." (Id., P 19.)

Defendants affix two stickers to each ABS bathtub before distributing them; one certifies that the bathtub conforms to ASTM E-162, and the other describes the manufacturer's warranty, and states that the bathtub was "tested for flammability in accordance with HUD Mobile Home Construction and Safety Standards Section 3280.203(b)(6)," and that "test results meet or exceed ASTM E-162 surface flammability of materials using a radiant heat energy source. (Id., PP 21, 22.)

Defendants Skyline Homes, Inc. and its parent company, Skyline Corporation, produce manufactured homes and install Better Bath ABS bathtubs in those homes. (Id., PP 9, 10, 26.) To comply with HUD standards, Skyline affixes a "date plate" to each manufactured home it produces to certify that the components comply with applicable HUD standards. (Id., P 23.) Skyline also provides a "Full 15-Month Warranty" to purchasers of its manufactured homes, which states defects in the home will be corrected without charge within a reasonable time. (Id., P 24.)

In her original Complaint, plaintiff alleged that the ABS bathtub in her manufactured home does not meet the Federal flammability standard under 24 CFR § 3280.203(b)(6). (Id., P 28.) On December 27, 2006, plaintiff filed a complaint in this Court, asserting a concealment claim on behalf of a nationwide class and claims under the California Unfair Competition Law and Consumer Legal Remedies Act ("CLRA") on behalf of a California subclass. (Pl.'s Opp'n 4:18-21.) Also, on December 27, 2006, plaintiff served notice on each of defendants of the warranty claims and CLRA claims she intended to assert on behalf of the classes. (Id., 4:21-3.)

On February 15, 2007, plaintiff filed a First Amended Class Action Complaint ("FAC") against defendants, and added claims for violation of the Magnuson-Moss Warranty Act, breach of express warranty, and violation of the Song-Beverly Consumer Warranty Act. (Id., 4:24-7.) Plaintiff added a request for damages under the CLRA, and added defendant Skyline Homes, Inc., a Skyline Corporation subsidiary. (Id., 4:27-5:1.) Based on notices she sent defendants on December 27, 2006, plaintiff alleges in the FAC that she served each of the defendants with notice of the ABS bathtub defect and that they have had "reasonable opportunity to cure the defect, but have failed to do so." (FAC, PP 54, 61, 64, 79.)

On March 23, 2007, defendants filed a motion to dismiss all claims for relief of the FAC for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. LEGAL STANDARD

A. Motion to Dismiss

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987). (quoting Hishon v. **[1064]** King & Spalding, 467 U.S. 69, 104 S. Ct. 2229, 81 L. Ed. 2d 59; 73 (1984)). Accordingly, the Court must "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 923 (9th Cir. 2001). However, the Court need not accept conclusory legal assertions as true Benson v. Ariz. State Bd. of Dental Exam'rs, 673 F.2d 272, 275-76 (9th Cir. 1982).

B. Preemption

The origins of preemption are found in the Supremacy Clause of the United States Constitution. U.S. Const. art VI, cl.2. This Constitutional provision explains that the laws of the federal government take precedence over state laws on the same matter and in effect invalidate state laws when they conflict with federal law.

The general rule is that federal law does not displace existing state law. Preemption is the exception to this rule. As the Supreme Court in Michigan Canners & Freezers Ass'n. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984) noted:

> [f]ederal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law Second, even in the absence of express pre-emptive language Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (quoting Hines v. Davidowitz, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941)) (balance of citations omitted).

See also California Federal S. & L. Assn. v. Guerra, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1986); Louisiana Public Service Com'n. v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580(1984).

[1065] There are two main prongs of preemption analysis. See Fidelity Fed. Sav. & Loan Assn v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). First, the Court examines the federal statute in question to see if the law contains an express preemption provision. See id. Express preemption analysis involves using statutory interpretation techniques to determine the extent of preemption described by the clause. See Aetna Health Inc. v. Davila, 542 U.S. 200, 217, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004). If there is no express provision, the Court looks for implied preemption. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

Implied preemption takes two forms: field preemption and conflict preemption. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). In field preemption, a federal regulation is so pervasive that it occupies an entire field and allows for no state action in the area. English v. Gen. Elec. Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Conflict preemption looks at whether the state law makes it either impossible to follow the federal law or provides a significant obstacle to adhering to the federal law. Freightliner, 514 U.S. at 287.

There are also two prongs to conflict preemption analysis: impossibility and obstacle. Id. When a state law makes it impossible to comply with a federal law, there is a clear conflict between the two and the state law is preempted. Id. The other branch of conflict preemption involves state laws that "prevent or frustrate the accomplishment of a federal objective." Geier v. Am. Honda Motor Co., 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Federal law thus preempts state law that "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." Id. (citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

The Supreme Court has cautioned, however, that "despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995). "Accordingly, the purpose of Congress is the ultimate touchstone of any preemption analysis." Cipollone, 505 U.S. at 516 (citations omitted).

III. ANALYSIS

1. Whether Plaintiff's First Amended Class Action Complaint is Preempted by the National Manufactured Housing Construction and Safety Act

The first issue raised by the parties is whether a class action complaint seeking state law relief for breach of warranty and consumer protection laws is properly brought where violations of a Federal manufactured housing standard gave rise to the alleged breach. [1] Based on the scope of the

preemption provisions and the savings clauses of the Act, and the lack of either field or conflict preemption in this case, the Court denies the motion to dismiss plaintiff's first amended complaint.

A. Statutory Scheme

In 1974, Congress enacted the National Manufactured Housing Construction and Safety Standards Act (the "Act") in order to establish a set of national construction and safety standards for manufactured homes. 42 U.S.C. § 5401, *et seq.* (1974). The purpose of the Act, among other things, was "to protect quality, durability, safety, and affordability of manufactured homes; . . . to provide for the establishment of practical, uniform, and, to the extent possible, performance-based Federal construction standards for manufactured homes; . . . [and] to protect residents of manufactured homes with respect to personal injuries and the amount of insurance costs and property damages in manufactured housing[.]" 42 U.S.C. § 5401(b) (1974). The Act directs the Secretary of the Department of Housing and Urban Development ("HUD") to create regulations imposing "high standards of protection" for manufactured homes and their component parts. 42 U.S.C. § 5403(a)(1) (1974).

HUD standards cover "all equipment and installations in the design, construction, transportation, fire safety, plumbing, **[1066]** heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units." 24 C.F.R. § 3280.1(a) (1975). The HUD regulations include a requirement that bathtubs installed in manufactured homes meet certain flammability standards: "finish surfaces of plastic bathtubs . . . shall not exceed a flame spread rating of 200." 24 C.F.R. § 3280.203(b)(6) (1984). "Finish surface" refers to the part of the bathtub that is visible after the bathtub is installed. (Pl.'s Opp'n 2:23-5.) The "flame spread rating" measures the amount of heat generated and distance the flame travels down the tested sample. (Id. 2:25-7.) All fire testing must be "performed by nationally recognized testing laboratories which have expertise in fire technology." 24 C.F.R. § 3280.209 (1984). The flame spread rating may be determined using the "Standard Test Method for Surface Flammability of Materials Using a radiant Heat Energy Source, ASTM E 162-94." 24 C.F.R. § 3280.203(a) (1984).

Before shipping to distributors and retailers, every manufactured home must be certified by the manufacturer that the home conforms to all applicable HUD construction and safety standards. 42 U.S.C. § 5415 (1975). A "date plate" must be affixed in a permanent manner to each manufactured home to certify that the home complies with HUD standards, including the flame spread rating. 24 C.F.R. § 3280.5 (1977). The HUD regulations provide remedial procedures for defective manufactured homes or components within the homes, including a duty of manufactured home builders to investigate consumer complaints, issue notice where applicable, and, under some circumstances, correct the defect or nonconformity. 24 C.F.R. §§ 3282.402, 3282.404, 3282.406, 3282.409, 3282.410, & 3282.414 (1977). However, "[n]othing in [the HUD] regulations shall limit the rights of the purchaser under any contract or applicable law." 24 C.F.R. § 3282.402(a) (1977).

B. Federal Preemption

1. Express Preemption

Under the Act, the presumption against preemption is overcome by an express preemption provision that leaves no doubt of Congressional intent to preempt certain areas of the manufactured housing industry. When Congress enacted the Act, it included an express preemption provision and two "savings" clauses. The preemption provision precludes state and local regulations that impose standards that are not identical to the federal standards:

> Supremacy of Federal standards.
>
> Whenever a Federal manufactured home construction and safety standard established under this title [42 USCS §§ 5401 *et seq.*] is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard. Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate

> State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this title [42 U.S.C.S. §§ 5401 *et seq.*]

42 U.S.C. 5403(d)(1974). The Act's preemption clause makes clear Congressional intent to preempt State law in certain areas of manufactured housing, and the **[1067]** clause also instructs a broad application of the Act's preemptive powers.

The Act's preemption clause gives specific instructions that State law standards are preempted by the Act. The language quoted above focuses on the preemption of any State "***standard*** regarding construction or safety . . . which is not identical to the Federal manufactured home construction and safety ***standard***." Id. (emphasis added). Furthermore, the language instructing that preemption be "broadly and liberally construed" is focused on "disparate State or local ***requirements or standards***" that "affect the uniformity and comprehensiveness" of the Federal standards. (emphasis added) Although defendants are correct to point out that the word "requirement" has been interpreted by the Supreme Court to include common law claims, Cipollone, 505 U.S. at 521 (1992), the clear language of the statute preempts only those state standards or requirements that differ from the Federal standards promulgated by the Act. See Turner v. PFS Corp., 674 So. 2d 60, 63 (Ala. 1995) ("only claims that impose different state standards are preempted"); MacMillan v. Redman Homes, Inc., 818 S.W.2d 87, 94 (Tex. App. 1991) (the manufactured housing act does not deny the right to bring a lawsuit; it simply denies the right to allege a theory of liability different from the federal standard); see also Leipart v. Guardian Indus., 234 F.3d 1063, 1068 (9th Cir. 2000) (analyzing an analogous statute, the Court found common law claims premised on violations of requirements identical to the federal standards are not preempted).

Here, plaintiff does not seek to impose standards or requirements that differ from the federal requirements of the Act. Rather, plaintiff seeks to enforce her contractual rights under warranties issued by defendants which guarantee compliance with the federal standard. Thus, not only does plaintiff's action not impose standards or requirements different from the federal regulations in the Act, plaintiff does not even directly enforce the regulations in the Act. The crux of plaintiff's case does not turn on whether the federal regulations were violated, but whether defendants' contractual promises were violated. Thus, the Court finds that the Act has no preemptive effect on plaintiff's claim because the Act states no authority over transactional claims, but rather, speaks to the standard of construction of the homes, themselves. As found by a sister district court, "the only restrictive effect that the NMHSCAA has on a private purchaser asserting a . . . contract claim under state law is that the Act's manufacturing standards are supreme over any standard that state law may impose." Hammond v. Cappaert Manufactured Hous., Inc., 2006 U.S. Dist. LEXIS 38606, 2006 WL 2570537 (W.D. La. 2006).

However, defendants highlight the language of the HUD regulations as preempting not only state standards or requirements but also judicial remedies which constitute a "system of enforcement of the Federal standards." (Def.'s Reply, 1:17.) Defendants cite language from the HUD regulations which states:

> These regulations establish the exclusive system for enforcement of the Federal standards. No state may establish or keep in effect through a building code enforcement system or otherwise, procedures or requirements which constitute systems of enforcement of the Federal standards . . . which are outside the system established in these regulations or go beyond this system to require remedial actions which are not required by the Act and these regulations.

24 C.F.R. 3282.11(c)(1977). However, as stated previously, plaintiff does not seek enforcement of the federal standards. Plaintiff seeks enforcement of the contractual **[1068]** terms she bargained for when she purchased her manufactured home and the components therein from defendants. Specifically, plaintiff seeks to enforce four separate express warranties made to her by defendants.

Moreover, the regulation cited by defendants features its own savings clause, which expressly preserves the right of consumers to bring actions to enforce warranties. "A State may establish or continue in force ***consumer protections***, such as ***warranty*** or ***warranty performance requirements***, which respond to individual consumer complaints and so do not constitute a system of

enforcement of the Federal standards[.]" Id. The clear import of this language is to expressly allow actions such as plaintiff's, which seek merely to remedy the breach of express terms warranted by defendants.

However, defendants protest that the use of the word "individual" in the 3282.11(c) savings clause prohibits class actions because class actions are not "individual" actions, and only an individual action does not constitute "a system of enforcement." (Def.'s Mot. 9:15-9.) However, the Ninth Circuit found that "statutory references to an "individual" has never before been read to preclude class format. Dukes v. Wal-Mart, Inc., 474 F.3d 1214,1241 (9th Cir. 2007) (citing Califano v. Yamasaki, 442 U.S. 682, 698-99, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). In addition, the language of the savings clause in 3282.11(c) does not readily lend itself to the interpretation that anything other than an "individual" action would constitute a system of enforcement. The language at issue can more readily be read to mean that consumer protections, such as warranties, do not constitute systems of enforcement for the very reasons discussed herein. Warranties do not enforce the Federal standards; they enforce guarantees made by the seller to the buyer to induce the buyer to enter the contract. In sum, the Court finds that Congress intended the preemption to extend only to regulations created by states and local authorities that differ from the federal standards, and not to legal claims of private consumers seeking to enforce the federal standards. See Choate, v. Champion Home Builders Co., 222 F.3d 788, 793-94 (10th Cir. 2000).

This conclusion is reinforced by the two saving clauses contained in 42 U.S.C. § 5409(c) and 42 U.S.C. § 5414(g), which address and explicitly preserve the rights of consumers to file civil actions under the Act.

42 U.S.C. § 5409(c) provides that "[c]ompliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law." 42 U.S.C. § 5409(c). Addressing a similar preemption argument in Choate, 222 F.3d at 793-94, the Tenth Circuit held that the plaintiffs'*products liability claim was not expressly preempted by the Act, nor that the claim was not impliedly preempted by Act. The Court paid special attention to 42 U.S.C. § 5409(c). Relying on the United States Supreme Court's preemption analysis in Geier, 529 U.S. at 868-74, the Tenth Circuit reasoned:

> [t]he saving clause [42 U.S.C. § 5409(c)] assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate-for example, where federal law creates only a floor, i.e., a minimum safety standard.

Choate, 222 F.3d at 793-94. Without the saving clause, the Tenth Circuit reasoned, **[1069]** a broad reading of the express preemption provision arguably might preempt civil actions, for it is possible to read the preemption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. Id. Such an interpretation would preempt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. Id. On that broad reading of the preemption clause, little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. Id. The panel found "no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances." Id.

Furthermore, within the section of the Act setting forth the notification and correction requirements that HUD may impose on manufacturers, Congress stated that "[n]othing in this section shall limit the rights of the purchaser or any other person under any contract or applicable law." 42 U.S.C. § 5414(g). A plain language reading of this provision reinforces the preemption provision as applying only to state and local regulations.

Applying Choate's analysis to the exact same savings clause and considering the presence of 42 U.S.C. § 5414(g), the Court finds that the broad reading that defendants ask the Court to adopt cannot be correct. The language of the preemption provision, 42 U.S.C. 5403(d), permits a narrow reading that excludes common law actions. Given the presence of the saving clause, the Court finds that plaintiff's claims are not expressly preempted.

ii. Implied Preemption

Defendants also argue that even if plaintiff's claims are not expressly preempted, they are preempted by implied conflict preemption. In support of this argument, defendants contend that the Act and the HUD regulations constitute a comprehensive regulatory scheme. According to defendants, allowing a state law action to proceed in the face of such a comprehensive scheme would be an obstacle to the accomplishment and execution of the purposes and objectives of Congress when it passed the Act. However, this argument is unpersuasive because defendants do not establish that plaintiff's claims would cause serious interference with the full purposes and objectives of Congress in passing the Act.

Implied preemption exists when (1) state law regulates conduct in a field Congress intended the Federal Government to occupy exclusively, or (2) when state law actually conflicts with federal law. See English, 496 U.S. at 79. The Court notes that defendants fail to make clear either in their initial motion or in their reply papers whether they argue that plaintiff's claim should fail because of field preemption or because of conflict preemption.

This Court concurs with the numerous federal and state courts which have held that neither of these types of implied preemption occur when a plaintiff's claims serve to increase compliance with the federal standards mandated by the National Manufactured Housing Construction and Safety Standards Act rather than impose different state standards. See Turner v. PFS Corp., 674 So. 2d 60, 63 (Ala. 1995) ("[E]nforcing the federal standards through state tort law does not frustrate federal supervision of the industry. The availability of tort claims may serve to increase compliance with the industry. **[1070]** Thus, only claims that impose different standards are preempted."); see also Redman Homes v. Ivy, 920 S.W.2d 664, 667 (Tex. 1996) ("[plaintiffs'] claims do not frustrate Congress's intent in enacting the NMHCSSA, which was to improve quality and to reduce personal injuries and property damage resulting from accidents involving mobile homes. ... To the contrary, state-law consumer protections enforcing such regulations further promote this purpose by encouraging manufacturers to build safe and suitable units."); see e.g. Shorter v. Champion Home Builders Co., 776 F. Supp. 333, 338 (N.D. Ohio 1991) ("The Court cannot find any evidence in the legislative history of the Act that would suggest that a state law claim would frustrate the intent of Congress in reducing personal injuries in mobile homes"); see Hall v. Fairmont Homes, Inc., 105 Ohio App. 3d 424, 664 N.E.2d 546, 556 (Ohio Ct. App. 1995)("We find that any state common law claim would serve to merely enforce the federal regulations, would not be disruptive of the federal scheme and would further the purpose of the Act of reducing personal injuries.")

As the Tenth Circuit in Choate recognized, the Manufactured Housing Act does not support the assertion that Congress intended for the federal government to occupy exclusively the field of construction and safety of manufactured homes. Choate, 222 F.3d at 795. Here, as in Choate, permitting Gonzalez's claim to go forward would be consistent with the stated purposes of the Act. Congress enacted the Act "to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401. Nothing in the "Congressional declaration of purposes" found in § 5401 suggests a purpose of providing manufacturers of mobile homes with relief from potentially higher standards derived from general state products liability law developed by state courts. Accordingly, the claim pursued by plaintiff is intended to increase safety and reduce the number of personal injuries resulting from manufactured home accidents. It would not, as defendants assert, result in an interpretation that would interfere with the purposes and objectives of the Act. Therefore, the Court finds that the plaintiff's First Amended Complaint is not preempted.

2. The CLRA Excludes Manufactured Homes

Defendants also move to dismiss plaintiff's fourth cause of action for a violation of the Consumers Legal Remedies Act ("CRLA"), Cal. Civ. Code § 1750 *et seq.* Of relevance to this case, the CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiff alleges that defendants violated the CLRA by certifying that ABS Bathtubs complied with flammability standards when in fact they did not, failing to disclose that ABS Bathtubs did not meet the flammability standards as represented, failing to remedy the defect, advertising and causing others to advertise that the bathtubs met the standards. (FAC, P 80). By engaging in this activity, plaintiff asserts, defendants' actions violated the CLRA through the

following: (1) misrepresenting the source, sponsorship, approval, or certification of goods or services; (2) representing that goods have approval, characteristics, ingredients, uses or benefits they do not have; (3) representing that goods are of a particular standard, quality, or grade when they are of another; and (4) advertising goods or services **[1071]** with intent not to sell them as advertised. Id.

Defendants assert that plaintiff's claim under the CLRA fails because manufactured homes are "residences" under the CRLA, and thus are exempt from the coverage of the CRLA. Defendants base this argument on § 1754 of the CRLA, entitled "Exemptions; structures", which states:

> The provisions of this title shall not apply to any transaction which provides for the construction, **sale,** or construction and sale of an entire **residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein,** or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale.

Cal. Civ. Code § 1754.

The Court notes that it finds no California or federal authority which has statutorily interpreted § 1754 of the CLRA. Defendants argue that under a plain reading of the statute a manufactured home, despite its movable character, clearly falls within the exemption set forth for "residences...with or without a parcel of real property or an interest therein...." Plaintiff counters that the CLRA's "real estate exemption" excludes only transactions involving the construction and sale of real property, not manufactured homes, which may be understood to fall within the definition of "goods" under the § 1761(a) of the CLRA. The CLRA defines "goods" as "tangible chattels bought or leased for use, primarily for personal, family, or household purposes...including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become part of real property, whether or not they are severable from the real property." Civ. Code § 1761(a).

Plaintiff advances two arguments that are useful in arriving at an interpretation of § 1754. First, plaintiff points out that manufactured homes are considered "goods" in many other contexts. The California Uniform Commercial Code § 9102(a)(44) defines "goods" as including "all things that are movable when a security interest attaches." Cal. U. Com. Code § 9102(a)(44). Moreover, "[t]he term includes...(v) manufactured homes." Id. Similarly, several other consumer-protection statutes including the Song-Beverly Consumer Warranty Act (Cal. Civ. Code § 1797) and the Magnuson-Moss Warranty Act (15 U.S.C. § 2301(1)) include "manufactured homes" in the definition of a "consumer product."

Secondly, plaintiff argues that defendants' argument that § 1754 encompasses manufactured homes is belied by the real estate exemption found in the Unruh Act, which is identical to the CLRA provision except that it expressly includes "mobile homes" as exempt. Cal. Civ. Code § 1801.4. The two exemption provisions were identical until 1980, when the Legislature amended the Unruh Act exemption to include "mobile homes."

Despite defendants' argument that there was no need for the Legislature to amend the CLRA to include the term "mobile homes" because it was already understood to be part of the normal meaning of "residence" in § 1754, the Court refrains from reading into the CLRA an exception not incorporated by the Legislature. See Pacific Motor Transport Co. v. State Bd. Of Education, 28 Cal. App. 3d 230, 235, 104 Cal. Rptr. 558 (Cal. Ct. App. 1972)("Courts may not read into a statute an exception not incorporated therein by the Legislature...unless such an exception must reasonably and necessarily be implied in order not to disregard or overturn a sound rule of public policy) (internal citations omitted). **[1072]** Moreover, in § 1760 of the CLRA, the Legislature mandates that courts are to construe the CLRA liberally. [2] Accordingly, in light of the definition of "goods" found in the California Uniform Commercial Code, the distinction between the exemption provisions in the Unruh Act and the CLRA, and the Legislature's explicit instruction to liberally construe the CLRA, the Court refrains to interpret "manufactured homes" as exempted under § 1754. Accordingly, the Court denies defendants motion to dismiss plaintiff's fourth cause of action under the CLRA.

3. The Song-Beverly Cause of Action is Properly Brought

Plaintiff's sixth cause of action alleges a violation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790 *et seq.* Based on breaches of both express and implied warranties. Defendants argue that

plaintiff's sixth claim for relief fails for two reasons. First, defendants contend that the implied warranty claim fails because plaintiff was not in privity with defendants. Second, defendants assert that the express warranty claim fails because plaintiff's pleading establish that she did not give defendants an opportunity to cure the alleged breach in this case. The Court addresses each of these arguments in turn

A. Implied Warranty Claim

Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 695-696, 268 P.2d 1041 (1954); Osborne v. Subaru of America, Inc., 198 Cal.App.3d 646, 656, 243 Cal. Rptr. 815 (1988). In this case, Gonzalez admits that she has no contractual relationship with defendants by alleging that she purchased her manufactured home, already containing the tub, from Skyline, not from any of the defendants. (FAC, PP 26-27, 93). However, although defendants argue that the implied warranty claims should be dismissed because they have no vertical privity with Gonzales, this argument ignores the plain language of the Song-Beverly Act, which has been interpreted by a sister-district court in this district as explicitly imposing an implied warranty on manufacturers as well as retail sellers.

Plaintiff calls the Court's attention to Gusse v. Damon Corp., 470 F.Supp.2d 1110 (C.D. Cal. 2007), in which a buyer of a motorhome brought an action against the manufacturer, alleging violations of California's Song-Beverly Consumer Warranty Act. Id. Defendants argued the plaintiff's cause of action under the Song-Beverly Consumer Act should be dismissed because of the lack of vertical contractual privity between the parties. Id. at 1116 The court rejected this argument and granted summary judgment in favor of the plaintiff. Id. at 1118. The court explained that the vertical privity argument "ignores the plain language of the Song-Beverly Act, which defines implied warranties for purposes of a federal Magnuson-Moss Act cause of action." Id. at 1116. The Magnuson-Moss Act explicitly states that: "[E]very sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable." See Cal. Civ. Code § 1792.

In addition, even were the Court to strictly apply the a vertical privity requirement, California law recognizes exceptions **[1073]** to the privity requirement where there has been reliance on the manufacturer's written representations in labels or advertising. See Windham at Carmel Mtn. Ranch Assn. v. Super. Ct., 109 Cal. App. 4th 1162, 1169, 135 Cal. Rptr. 2d 834 (Cal. Ct. App. 2003). As plaintiff points out, this 7 exception is applicable to this case because defendants are alleged to have made misrepresentations to plaintiff with respect to the flame resistance of the ABS Bathtubs. As the Court stated previously, dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). Accordingly, the Court denies defendants' motion to dismiss plaintiff's implied warranty claim under the Song-Beverly Act.

B. Express Warranty Claim

Defendants argue that plaintiff did not give defendants notice and an opportunity to cure the alleged defect in her ABS Bathtub prior to removing it, which forecloses her Song-Beverly express warranty claim.

A plaintiff pursuing an action under the Song-Beverly Act has the burden to prove the following elements: (1) the product had a defect or nonconformity covered by the express warranty; (2) the product was presented to an authorized representative of the manufacturer for repair; and (3) the manufacturer or its representative did not repair the defect or nonconformity after a reasonable number of repair attempts. Robertson v. Fleetwood Travel Trailers of California, Inc., 144 Cal.App.4th 785, 798, 50 Cal. Rptr. 3d 731 (2006). Defendants argue that defendants did not have a reasonable opportunity to cure any alleged defect because plaintiff replaced her bathtub prior to notifying the manufacturer of the defect and giving defendants an opportunity to cure prior to filing the original complaint and FAC.

This argument is unavailing. Plaintiff gave notice of the alleged defect on December 27, 2006, the same date of the filing of the original complaint. It was not until fifty days later, on February 15, 2007, after defendants made no effort to respond to plaintiff's notice, that plaintiff amended her complaint to includes causes of action under the Song-Beverly Act. In her FAC, plaintiff alleges: "Defendants have received notice of the ABS Bathtub defect and have had reasonable opportunity to cure the defect, but have failed to do so." (FAC PP 54, 61, 64, 79). The Court finds plaintiff's allegations that notice was given to defendants sufficient to withstand a 12(b)(6) dismissal. Any factual disputes concerning the sufficiency of the notice provided would be appropriate on a motion for summary judgment. Accordingly, the Court denies defendants' motion to dismiss plaintiff's express warranty claim under the Song-Beverly Act.

IV. CONCLUSION

For the foregoing reasons, the Court denies defendants' motion to dismiss plaintiff's First Amended Complaint.

IT IS SO ORDERED.

Dated: 5-10-07

DEAN D. PREGERSON

United States District Judge

Footnote 1

Although plaintiff brings a cause of action for violation of the Federal Magnuson-Moss Warranty Act, Magnuson-Moss actions maybe brought in Federal or State courts. 15 § 2310(d)(1975). The parties have not distinguished the Federal character of Magnuson-Moss from State law for preemption purposes, and, accordingly, the Court declines to do so.

Footnote 2

"This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Cal. Civ. Code. § 1760.

Exhibit 18

ORDINANCE NO. 794

AN ORDINANCE OF THE CITY OF SAN CLEMENTE, CALIFORNIA, ESTABLISHING REGULATIONS PERTAINING TO USES OF LAND AND USES, LOCATION, HEIGHT, BULK, SIZE AND TYPE OF BUILDING AND OPEN SPACES AROUND BUILDINGS IN CERTAIN DISTRICTS OF THE CITY, SPECIFYING SAID DISTRICTS; PROVIDING FOR THE ADMINISTRATION AND ENFORCEMENT OF SUCH REGULATIONS AND PRESCRIBING PENALTIES FOR VIOLATIONS THEREOF, REPEALING ORDINANCES IN CONFLICT HEREWITH.

The City Council of the City of San Clemente does ordain as follows:.

(CITY CLERK'S NOTE: Due to the extensive length of this Ordinance consisting of 194 letter size pages, said Ordinance is not set forth in full herein. For the complete text of Ordinance No. 794 refer to the file containing the original fully executed Ordinance.)

APPROVED, ADOPTED, and SIGNED this 18th day of February, 1981.

MAYOR of the City of
San Clemente, California

(SEAL)

ATTEST:
CITY CLERK of the City of
San Clemente, California

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS.
CITY OF SAN CLEMENTE)

I, MAX L. BERG, Clerk of the City of San Clemente, California, hereby certify that the foregoing Ordinance having been regularly introduced at the meetings of December 3 and December 17, 1980, was again introduced, the reading in full thereof unanimously waived, and duly passed and adopted at a regular meeting of the City Council held on the 18th day of February, 1981 and that said Ordinance was passed and adopted by the following stated vote, to wit:

AYES:	Council Members -	KORSEN, LIMBERG, MECHAM, AND KOESTER
NOES:	Council Members -	NONE
ABSENT:	Council Members -	LANE

and was thereafter on said day signed and approved by the Mayor of said City.

ATTEST:
CITY CLERK of the City of
San Clemente, California

(SEAL)

ORD. 794
1960

4.21 OPEN SPACE DISTRICT

4.21-1 INTENT AND PURPOSE

To implement appropriate sections of the Open Space Element of the General Plan which proposes a system of permanent multifunctional, publicly and privately owned open space in the City; to specify open space as the principal use of land and all structures except residences, as accessory uses subject to a low percentage of land coverage proportional with the lot or site area; to identify and assure permanent open space to meet the City's present and prospective needs for various recreational and cultural activities under public and private control in accordance with the Recreational Element of the General Plan; to facilitate the creation, expansion and conservation of open spaces that provide the setting for urban development and visual amenities for people; to insure the public health and safety by contributing to the protection of natural life support systems, including airshed and watershed plant areas; to contribute to environmental quality by reducing noise pollution and providing psychological relief from city living; to retain land for agriculture and agricultural residency where feasible, in an urban environment; to preserve and enhance the values of natural and human resources including topographic and geologic features, plant life, historic places, scenic attractions and submerged territory; to designate rights-of-way on the Zoning Plan for special distribution elements, including flood control channels, reservoirs and major power transmission lines; to designate a physical and legal barrier to growth by restricting residential development to densities in certain hillside and flood plain areas, where potential danger from landslides and flood damage is present; to recognize and conserve natural recreational resources in mountain, coastal plain and shoreline areas, and to provide optimum public and private use of such land without adversely affecting the physical environment.

4.21-2 DEVELOPMENT STANDARDS

A. Zone area, minimum - for non-residential uses - one acre.

B. Lot or site area, minimum - for public ownership - none.

C. Lot or site area, minimum - for Planned Development - 5 acres.

D. Front yard, minimum, any building or structure - 25 feet.

E. Side yards, minimum, 10 feet.

F. Rear yard, minimum, 25 feet.

G. Setbacks, as defined herein, for the O-S District, may be modified by the Planning Commission, for Planned Residential Development, under the Use Permit procedure.

H. Height limits for principal and accessory uses and structures:

Height, maximum, main building - 2 stories or 30 feet, whichever is less.

Height, maximum, accessory buildings - 2 stories or 24 feet whichever is less.

Height, maximum, planned residential development to be established by the City Planning Commission in the approval of the project.

4.21-2 (Continued)

I. Land coverage Planned Development. To be determined by the City Planning Commission in the approval of the Planned Development of the project.

J. Parking

The parking for single family residential uses shall be the same as those required in Section 4.1, R-1 District.

The amount and location of parking for Planned Residential Development shall be established by the Planning Commission in the approval of the project, but in no case shall the number of stalls be less than that required in Section 4.1, R-1 District.

The amount and location of parking for other uses permitted by Special Use Permit shall be established by the Planning Commission in the approval of the Special Use Permit.

The amount and location of parking for all other uses permitted in this Section shall be the same as for comparable uses permitted in Section 4 of the Zoning Ordinance.

K. Signs, onsite

Identification sign - maximum - 2 square feet.

Directional sign - maximum - 4 square feet.

Real Estate sign - maximum - 4 square feet.

One on each property.

In the case of those uses permitted by Special Use Permit, the City Planning Commission shall determine the size and number of signs in each project.

4.21-3 SPECIAL DEVELOPMENT STANDARDS

A. All structural installations, uses and surface improvements shall be of such limited size, scale and height, and have an appropriate location, ground coverage, and spacing so as not to significantly interfere with or adversely affect the quality and quantity of the various types of open spaces regulated by this Zone.

B. There must be no chemical and biological contamination or soiling of any open space areas, whether on land or submerged territory, by industrial, commercial, institutional, extractive or circulatory uses.

C. Emission of smoke, steam, chemical, odor, sound, artificial light or other forms of atmospheric pollution or environmental impairment from any permitted institutional, extractive or vehicular installations or facility should be controlled so the purpose and intent of this Zone is realized.

D. No industrial, commercial, institutional, extractive or circulatory operations should be undertaken when or where they may cause significant alterations in the underlying geologic stability in those areas zoned "Open Space" or otherwise bring about undesirable changes of basic topographical conditions.

PERMITTED USES

1. Animals, commercial grazing of large species, including their supplementary feeding, provided that:

   The use is limited to horses, cattle, sheep and goats,

   The minimum lot or site area is five acres,

   Proper grazing methods are employed to prevent depletion of turf and seed supply, and,

   Such grazing is not a part of, nor conducted in conjunction with, any dairy, livestock feed yard, livestock sales yard, or commercial riding academy located on the premises, and,

   Such grazing is at least 100 feet from the nearest neighboring residential building.

2. Agriculture (See Farming and Animals)
3. Arboretums, public or private
4. Botanical gardens
5. Campgrounds and camps, undeveloped, for temporary occupancy by campers traveling by foot or horse
6. Court games (See parks)
7. Farming, plant, including berry, bush, field, mushroom, orchard and tree crops, plant nurseries, truck gardens, including sales of only stock grown on the premises
8. Fishing, sport
9. Golf courses, public
10. Malls (See Pedestrian Malls)
11. Nurseries, plant (See Farming)
12. Parks, playgrounds, court games and picnic grounds, public pedestrian malls and plazas
13. Polo grounds
14. Preserves, archeological, botanical, geological, historical, and wildlife
15. Recreation and open space owned and maintained through an authorized lease, permit or license issued by a Federal, State, or County agency, provided that prior to the establishment of any use, a copy of a valid letter designating the use to be part of a comprehensive recreation plan and signed by the appropriate agency shall be filed with the Office of the Director of Planning.
16. Riding, hiking, and bicycle trails (See Trails)
17. Trails, riding, hiking and bicycle, but not including motor driven vehicles
18. Truck gardens (See Farming)
19. Utilities, public and private, utilities such as water wells, gauging stations, settling basins, and drainage channels
20. Vista points and turnouts
21. Zoos, public

4.21-5 USES REQUIRING A USE PERMIT

1. Amusement parks and fairgrounds, temporary
2. Animal, commercial raising of large-sized species, including boarding or training of horses, cattle, swine, sheep and goats, provided the site area is five acres or more.
3. Animal, commercial raising of small-sized species, such as poultry, birds, fish, fowl, rabbits, chinchillas, mice, frogs, earthworms, lady bugs, insects and others of similar nature, form and size, including hatching and fattening, and involving eggs or similar products derived therefrom.
4. Apiaries (Bee Raising)
5. Aquariums
6. Arenas (See Sports Arenas)
7. Athletic Fields
8. Aviaries (Bird raising)
9. Baseball batting and pitching range, private
10. Bicycle rental concession. (See Commercial Concession)
11. Boat and other marine accessories rental concession.
12. Campgrounds and camps, developed, publicly or privately owned or operated, for temporary occupancy by campers traveling by vehicle, containing picnic areas, recreation areas, overnight camping facilities and temporary parking for travel trailers, camper trucks and recreation vehicles.
13. Carnivals, circuses and rodeos, temporary on private property.
14. Cemeteries, including columbariums, crematories, mausoleums and mortuaries as accessory to a cemetery.
15. Child day care, more than 3 day-care children
16. Child foster care, limited to 5 to 6 children
17. Churches
18. Commercial concessions accessory to and serving the patrons of a park, beach, playground, riding academy or other similar public or private facility, and including restaurants, refreshment stands, small shops, dispensing sporting goods, convenience goods and souvenirs, and rental agencies for bicycles, boats, motorcycles, etc.
19. Communication equipment buildings (See Utilities)
20. Community antenna facilities franchised by the City for cable television or radio service.
21. Community recreation center, public or private
22. Country clubs, including restaurants and bars, which are accessory to golf courses, provided that such uses shall be designed and scaled to meet only the requirements of the club members and their guests.

4.21-5 (Continued)

23. Dairy products processing, accessory.
24. Dance pavilions, open air, publicly or privately owned or operated.
25. Dwelling units and dormitories for agricultural and recreational area for employees and their families, provided the average grade of property is not more than 15%. The Planning Commission shall authorize the appropriate density for each application.
26. Dwelling, residential planned development. The City Planning Commission may approve the clustering of dwellings of various types on the more level areas of an ownership, provided the total number of dwelling units does not exceed 1½ units per gross acre, and further, that those parts of the property with slope greater than 30%, hazardous areas, natural features and earthquake hazard areas are maintained in open, undeveloped space; and provided the number of dwelling units per net acre in the planned development does not exceed 15 units.

    All residential development shall conform to the requirements of Section 4.27 of the Zoning Ordinance. (PRD - Planned Residential Development)
27. Electric distribution substation. (See Utilities)
28. Electric power transmission lines. (See Utilities)
29. Fairgrounds (See Amusement Parks)
30. Fire Stations
31. Geological exploratory core holes, temporary, except that oil exploration is prohibited on any beach area between the outermost seaward city boundary and a line 3000 feet inland from the first public street beyond the beach.
32. Golf courses, regulation, private.
33. Golf driving ranges, par 3 golf courses, and pitch and putt golf courses.
34. Gymnasiums and field houses.
35. Helistops.
36. Land reclamation projects, public, through the disposal of rubbish.
37. Libraries.
38. Mobile Home Parks
39. Mortuaries and mausoleums. (See Cemeteries)
40. Museums or galleries, public.
41. Natural resources.
42. Observatories or planetariums.
43. Parks, playgrounds, court games and picnic grounds, private.
44. Police stations.
45. Public works maintenance and storage yards and service centers.
46. Railroad right-of-way.
47. Recreation center. (See Community Recreation Center)

4.21-5
(Continued)

48. Religious retreat.
49. Restaurants and other eating establishments. (See Commercial Concessions)
50. Riding academies and public stables for the boarding of horses on site areas of more than 5 acres.
51. Sewage treatment plants. (See Utilities)
52. Shooting ranges.
53. Skating rinks, open air.
54. Solid fill projects.
55. Sports arenas and stadiums.
56. Stables, public. (See riding academies)
57. Stores. (See Commercial Concessions)
58. Swine keeping. (See Animals, commercial raising)
59. Theatres, open air, but not including drive-ins.
60. Tourist information offices.
61. Transmitting towers, television, radio, and microwave.
62. Utilities, public and private, including dams, natural and man-made reservoirs and lakes, water treatment plants and pumping stations, sewage treatment plants, overhead electric power transmissions lines, including rights-of-way, communication equipment buildings, service centers, maintenance and storage yards, and electric distribution substations, transformer stations and related uses.
63. Zoos or menageries, private.
64. Other uses which the City Planning Commission may determine fall within the intent and purpose of open space zoning, are of a comparable nature to the uses enumerated in this Section, and will not be detrimental to other open space uses in the vicinity. The City Planning Commission shall assign the use to the proper procedural category, whether a permitted use, an accessory use, or a use requiring a Use Permit, and may require an Environmental Impact Report prior to its determination.

Exhibit 19

ORDINANCE NO. 926

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, AMENDING ORDINANCE NO. 794, THE SAN CLEMENTE ZONING ORDINANCE, RELATING TO THE SENIOR CITIZENS HOUSING OVERLAY DISTRICT

WHEREAS, on December 18, 1985, the San Clemente City Council directed the Planning Commission to consider amendments to the City Zoning Ordinance regarding senior housing projects; and

WHEREAS, an environmental assessment was prepared for this amendment on February 6, 1986, in accordance with the California Environmental Quality Act, the Planning Division having determined that the proposed zoning amendment will not have a significant environmental effect and that a negative declaration is warranted; and

WHEREAS, the Development Management Team reviewed the subject amendment on February 26, 1986, and determined that it does not violate the public health, safety and welfare of the residents of the City and is compatible with the objectives, policies, general land uses and programs specified in the General Plan and Zoning Ordinance of the City of San Clemente; and

WHEREAS, on March 4, 1986, and March 18, 1986, the Planning Commission held a duly noticed public hearing and, after considering the evidence and argument presented by the Planning Division staff and other interested persons, adopted its Resolution No. 86-28 recommending to the City Council that it adopt the proposed zoning amendment, subject to certain additional modifications; and

WHEREAS, on April 16, 1986, the City Council held a duly noticed public hearing, considered the evidence and argument presented by the staff and other interested persons, and adopted a Negative Declaration for said zoning amendment;

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of San Clemente as follows:

SECTION 1. Ordinance No. 794, the San Clemente Zoning Ordinance, is hereby amended by adding thereto a new Section 4.31, entitled "Senior Housing Projects," the text of said new section to read as provided in Exhibit "A" hereto.

SECTION 2. Sections 4.2 ("Duplex Residential District"), 4.3 ("Multiple Family Residential"), 4.4 ("Garden Apartment"), 4.5 ("Multiple Residential"), 4.7 ("Central Commercial"), and 4.11 ("Commercial Apartment") are hereby amended with respect to Senior Housing Projects only, as reflected on Exhibit "B" hereto.

SECTION 3: The City Clerk shall certify to the passage of this Ordinance and cause the same to be published as required by law, and the same shall take effect as provided by law.

APPROVED, ADOPTED, and SIGNED this 21st day of May, 1986.

William C. Mack
Mayor of the City of San Clemente, California

ATTEST:

Marjorie L. Hill
Deputy City Clerk of the City of San Clemente, California

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS.
CITY OF SAN CLEMENTE)

I, MYRNA ERWAY, Clerk of the City of San Clemente, California, hereby certify that the foregoing Ordinance having been regularly introduced at the meeting of May 7, 1986, was again introduced, the reading in full thereof unanimously waived, and duly passed and adopted at a regular meeting of the City Council held on the 21st day of May, 1986, and that said Ordinance was passed and adopted by the following stated vote, to wit:

AYES: Councilmembers CARR, DIEHL, LINBERG, AND MECHAM
NOES: Councilmembers KOESTER
ABSENT: Councilmembers NONE

and was thereafter on said day signed and approved by the Mayor of said City.

Approved as to form:
City Attorney

Marjorie L. Hill
Deputy City Clerk of the City of San Clemente, California

EXHIBITS "A" AND "B" Attached to original Ordinance in File

District	None But the Following Uses or Uses Which in The Opinion of the Planning Commission Are Similar Will Be Allowed. See Section 5.2	Use Permit Required	Maximum Height Limit Maximum Number of Stories	Minimum Building Site Square Feet All Lots	Minimum Lot Width Required in Feet All Lots	Maximum Allowable Lot Coverage All Structures	Front Yard Required in Feet	Minimum Side Yard Setback		Minimum Rear Yard Setback		Minimum Lot Area per Family Unit	Minimum Off-street Parking Space Required. Planning Commission May Prescribe the Amount of Parking for Uses Not Listed Herein
								Corner Lot Street Side	Interior Lot	Corner Lot	Interior Lot		
O-A Open Area and Recreation District (Continued) Section 4.22	materials that might tend to defeat the purpose of this district. Business concessions in connection with above uses.	Yes	AS SPECIFIED IN USE PERMIT										As specified in Use Permit, by the Planning Commission.

District	None But the Following Uses or Uses Which in The Opinion of the Planning Commission Are Similar Will Be Allowed. See Section 5.2	Use Permit Required	Maximum Height Limit Maximum Number of Stories	Minimum Building Site Square Feet All Lots	Minimum Lot Width Required in Feet All Lots	Maximum Allowable Lot Coverage All Structures	Front Yard Required in Feet	Minimum Side Yard Setback		Minimum Rear Yard Setback		Minimum Lot Area per Family Unit	Minimum Off-street Parking Space Required. Planning Commission May Prescribe the Amount of Parking for Uses Not Listed Herein
								Corner Lot Street Side	Interior Lot	Corner Lot	Interior Lot		
O-A Open Area and Recreation District Section 4.22	The purpose of this District is to promote and preserve open areas in an otherwise urban or semi-urban development to hold for future generations - open spaces in which trees and plants will be preserved. Public parks, playground, golf courses, public beaches, public piers, crop and tree farming. Establishment and maintenance of tracks and appurtenant R.R. facilities. Private, non-profit recreational facilities, buildings accessory to any permitted use. Any structure or use or removal of any vegetation or natural	Yes	AS SPECIFIED IN USE PERMIT										As specified in Use Permit, by the Planning Commission.

District	None But the Following Uses or Uses Which in The Opinion of the Planning Commission Are Similar Will Be Allowed. See Section 5.2	Use Permit Required	Maximum Height Limit Maximum Number of Stories	Minimum Building Site Square Feet All Lots	Minimum Lot Width Required in Feet All Lots	Maximum Allowable Lot Coverage All Structures	Front Yard Required in Feet	Minimum Side Yard Setback		Minimum Rear Yard Setback		Minimum Lot Area per Family Unit	Minimum Off-street Parking Space Required. Planning Commission May Prescribe the Amount of Parking for Uses Not Listed Herein
								Corner Lot Street Side	Interior Lot	Corner Lot	Interior Lot		
S-1 District Shore-line Dis-trict Section 4.20	Public park and recreational facilities and business concessions in connection therewith Public piers, jetties, wharfs, harbor works and appurtenant accessories. Private clubs and commercial bath houses. Private or rental cabanas without kitchens and not suitable for a dwelling but serving only as a temporary shelter and dressing room. Other public uses.	Yes	25 feet										As specified in Use Permit, by the Planning Commission.

Exhibit 20

PROOF OF PUBLICATION
(2015.5 C.C.P.)

STATE OF CALIFORNIA
County of Orange
City of San Clemente

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-titled matter. I am the principal clerk of the printer of the San Clemente Sun/Post, a newspaper of general circulation printed and published daily in the City of San Clemente, County of Orange, and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Orange, State of California under the date of March 11, 1960.

Case Number A9140;

that the notice, of which the annexed is a printed copy (set in type not smaller than nonpareil), has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

Mar.12,

all in the year 1993.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated at San Clemente, California, this 12th day of Mar. 19 93.

Signature Monica Ponte

SAN CLEMENTE PUBLISHING CORP.
1542 N. El Camino Real, P.O. Box 367
San Clemente California 92672
Phone (714) 492-5121

Pg. 1

Proof of Publication

Notice of Public Hearing

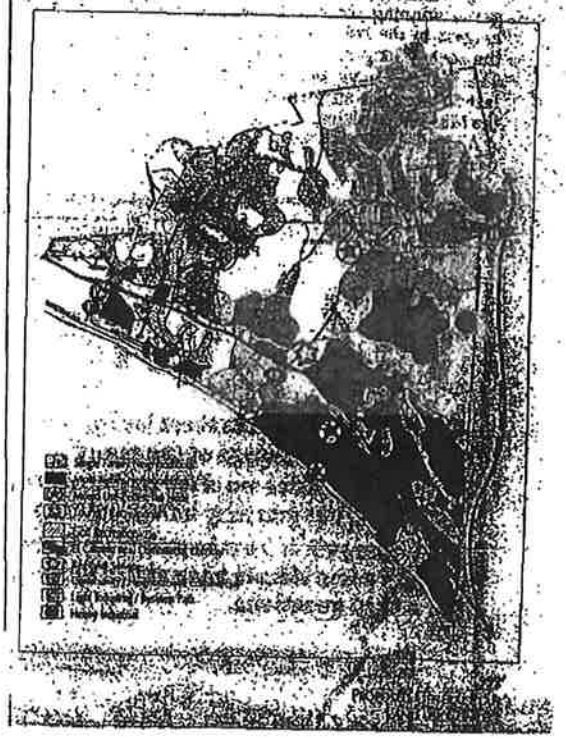
NOTICE OF PUBLIC HEARING
NOTICE IS HEREBY GIVEN THAT A
PUBLIC HEARING WILL BE HELD
BY THE CITY COUNCIL OF THE
CITY OF SAN CLEMENTE, CALIFORNIA
RELATIVE TO THE FOLLOWING:

COMPREHENSIVE GENERAL PLAN AMENDMENT 92-05/1992 DRAFT GENERAL PLAN

The comprehensive amendment would replace the existing General Plan which was last comprehensively updated in 1982 (excluding the Housing Element) governing the entire City of San Clemente. The 1992 Draft General Plan includes goals, objectives, policies and implementation programs for the following topic areas known as General Plan Elements: Land Use, Urban Design, Economic Development, Circulation, Scenic Highways, Utilities, Public Facilities and Services, Parks and Recreation, Growth Management, Natural and Historic/Cultural Resources, Energy Conservation, Geologic Hazards, Fire Hazards, Natural Hazards, Noise, Hazardous Materials and Safety, Housing, and Coastal. The Urban Design and Economic Development Elements are new topic areas.

Key features of the proposed General Plan Land Use Element include:

A Revised Land Use Map; two land use alternatives are proposed.
Floor Area Ratios for Commercial Uses.
A Spanish Colonial Architecture Overlay Zone.
Mixed Uses Zones.
Pedestrian Oriented Development Overlay Zones.
Consolidation of Automobile Related Land Uses.
Designation of the San Clemente High School Site for Regional Commercial Uses.
Designation of the Pico Pavilion area for Commercial Uses.
Designation of the U-Haul Site for Mixed Use Commercial.
Designation of the Los Molinos Industrial area for a Business Park.
Designation of the Marblehead Coastal Site for a Open Space/Park.
Preservation of Designated Canyon Areas as Open Space.
Designation of All Public School Sites (except [illegible]) for Public Use.
Designation of the Existing Civic Center Site for Commercial Uses.
Several Other Minor Land Use Changes are Proposed City-Wide.



Pg. 2

Key features of the proposed Coastal Element are as follows:
Commercial/Mixed Use:
North Beach-Change land use designations from Highway Commercial and Tourist Recreational to Mixed Use.
Downtown (Avenida Del Mar/El Camino Real)-Change land use designation from Central Commercial to Mixed Use.
Pier Bowl-Change land use designation from Tourist Recreational to Mixed Use.
El Camino Real-Differentiate the El Camino Real Corridor into six (6) Commercial or Mixed Use sub-districts. Change the land use designation from Highway Commercial to Neighborhood Commercial or Mixed Use.
U-Haul Site on Avenida Pico-Change land use designation from General Industrial to Mixed Use.
Los Molinos/Calle Valle Triangle-Change from Central Commercial to General Industrial/Business Park.
Industrial Centers
Los Molinos-Change the land use designation from General Industrial to Light Industrial/Business Park. (This change will be included in the revised Coastal Element.)
Destination Resorts
Marblehead Coastal-Change the land use designation from Development District-Coastal to Mixed Use to allow for a 600 room destination resort hotel, championship golf course, approximately 300 dwelling units, a public park and ancillary facilities. Policy allows for the siting of the existing on-site coastal canyons to be mitigated off-site.
Shorecliffs Country Club-Permit a 500 room hotel and golf course as per the current General Plan concept. Change the land use designation from Resort Hotel to Tourist/Visitor Commercial and Open Space.
Open Space
Cossad Trailer Park-Retain 1982 General Plan concept of Public Open Space/Shoreline for trailer park located on ocean side of Pacific Coast Highway in North Beach.
Retain all existing designated open space, recreation areas, "common" areas designated tract map or easement, and designated coastal canyons, (excluding the canyons on the Marblehead Coastal site). Change current land use designations to Open Space.
Public Uses:
Change residential designation on all public school sites (excluding SOHO) to Public land use designation. (Changes within the Coastal Zone will be reflected in the revised Coastal Element.)
Sewage Treatment Plant-Change the land use designation from General Industrial to Public.
DRAFT ENVIRONMENTAL IMPACT REPORT (DEIR) 92-04
DEIR 92-04 identifies the potential environmental impacts of, and alternatives to, the proposed General Plan. It also contains mitigation measures to reduce identified potential impacts to levels of insignificance and discusses those project impacts which cannot be reduced to a level of insignificance.
Notice is hereby given that DEIR 92-04 was prepared and processed in accordance with the California Environmental Quality Act and is on file along with Draft General Plan 92-06 for public inspection and comment by contacting the Community Development Department, or by telephoning (714)498-2538. Copies of both the Draft General Plan and DEIR are also available for review at the San Clemente Library, 242 Avenida Del Mar, San Clemente, California.
If you challenge the proposed Draft General Plan Amendment 92-06 or DEIR 92-04 in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of San Clemente at, or prior to, the public hearing.
Notice is further given that said Public Hearing will be held at an Adjourned Regular Meeting of the City Council on Wednesday, March 24, 1993 at 7:00 p.m. in the Council Chambers, located at 100 Avenida Presidio, San Clemente, California.
(s) MYNA ESTWAY
City [redacted]

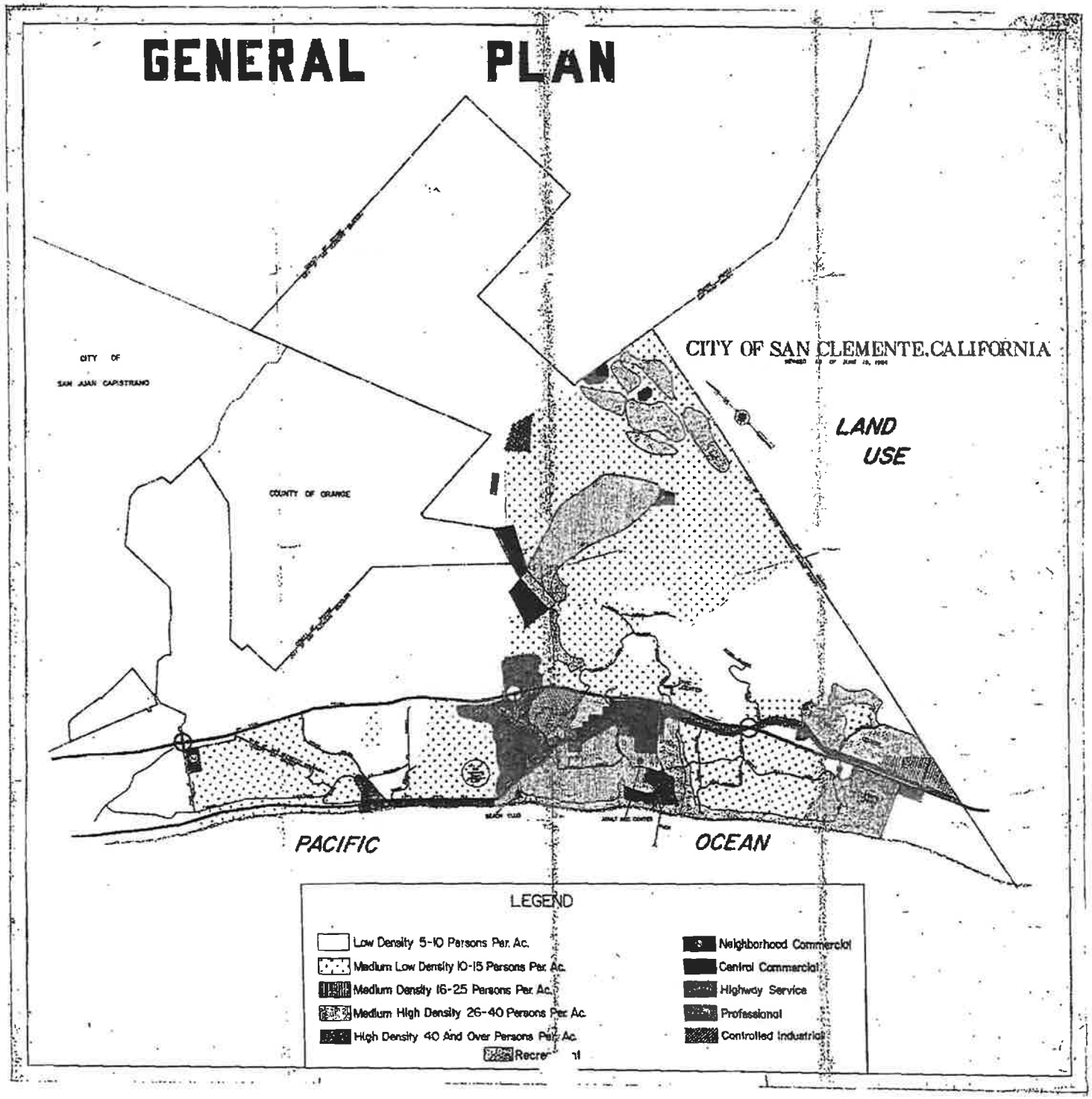
I, JOANNE M. BAADE, CITY CLERK OF THE CITY OF SAN CLEMENTE, STATE OF CALIFORNIA, HEREBY CERTIFY UNDER PENALTY OF PERJURY THE FOREGOING INSTRUMENT TO BE A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL NOW ON FILE IN MY OFFICE.

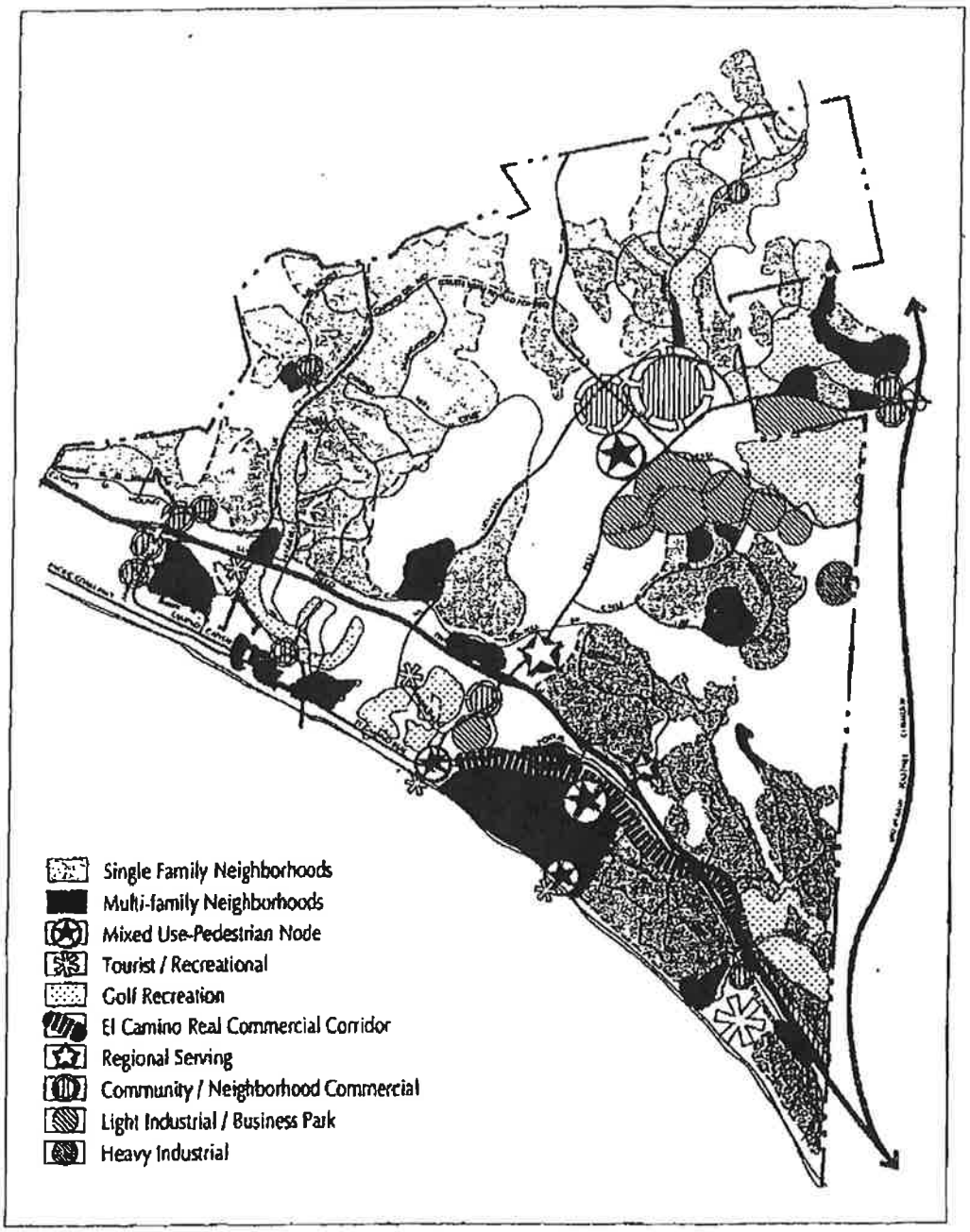
DATE: 7-21-08

JOANNE M. BAADE
CITY CLERK

BY: _____

GENERAL PLAN





1992
PROPOSED GENERAL PLAN
LAND USE CONCEPT

Exhibit 21

CERTIFICATION OF THE ADMINISTRATIVE RECORD

I hereby certify that the following documents, from pages AR 000001 – AR 032880 constitute the true, and correct Administrative Record prepared by Defendant City of San Clemente in the matter titled *Avenida San Juan Partnership v. City of San Clemente, et al.*, Orange County Superior Court Case No. 30-2008 00101411.

Dated: JAN. 23, 2009

By: Joanne Baade

Joanne Baade
City Clerk
City of San Clemente

Avenida San Juan Partnership v. City of San Clemente
Orange County Superior Court Case No. 30-2008 00101411

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199.	05/08/1982	Handwritten Meeting Notes	031881
200.	05/14/1982	Article from Daily Sun	031882
201.	10/08/1982	Uniform Application Regarding 404 E. Avenida San Juan	031883 - 031885

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202.	10/08/1982	Environmental Assessment Form Regarding 404 E. Avenida San Juan	031886 - 031892
203.	10/10/1982	Geotechnical Investigation Avenida San Juan Subdivision by Greg Axten	031893 - 031970
204.	10/10/1982	Excerpt of Geotechnical Investigation by Greg Axten with Handwritten Comments	031971
205.	1982	Map of Geotechnical Review	031972 - 031973
206.	10/14/1982	Letter from Ed Villanueva Enclosing Tentative Parcel Map	031974 - 031978
207.	10/26/1982	Letter from W.A. Badsgard to City of San Clemente Regarding Parcel Map 82-832	031979
208.	10/27/1982	Transmittal Letter from City of San Clemente to 2R Engineering	031980
209.	10/28/1982	Memo from Duane Norton to Ernie Glover Regarding Estancias San Juan Tentative Tract 11793	031981
210.	11/08/1982	Geotechnical Review by 2R Engineering	031982 - 031983
211.	11/10/1982	Letter from Edward Putz to Avenida San Juan Partnership Regarding P.M. 82-832, Geotechnical Review	031984
212.	12/06/1982	Environmental Checklist Form re Tentative Parcel Map 82-832	031985 - 031991
213.	12/1982	Schedule of City Meetings	031992
214.	12/10/1982	Negative Declaration Regarding TPM 82-832; A Proposal to Allow the Construction of Four Single Family Residences on 2.82 Acres in the R-1 B-1 District	031993
215.	12/16/1982	Memo from Edward Putz to Ernest Glover Regarding New Standard Condition Specifically Relating to San Juan Partnership Project	031994
216.	02/1983	Map of Landslides by James Knowlton	031995
217.	02/04/1983	Letter from James Knowlton to Avenida San Juan Partnership Regarding Response to City Review	031996 - 032000

File #	Date	Description	Page(s) ("AR")
218.	03/16/1983	Report from 2R Engineering to City Regarding Geotechnical Review of Supplemental Report Avenida San Juan Subdivision	032001 - 032003
219.	03/24/1983	Letter of Transmittal to Irvine Soils Engineering	032004
220.	04/01/1983	Plates and Maps for James Knowlton's Geotechnical Investigation	032005 - 032007
221.	Undated	Handwritten Geotechnical Report	032008
222.	04/19/1983	Supplemental Geologic Investigation by James Knowlton	032009 - 032018
223.	04/28/1983	Report from 2R Engineering to City Regarding Review of Supplemental Geologic Investigation Avenida San Juan and Mayita	032019 - 032021
224.	06/28/1983	Letter from Pauline Jordan to Planning Commission Regarding Tentative Parcel Map 82-832	032022
225.	07/01/1983	Memo from Marge Anderson to Planning Commission Regarding Correction to Conditions of Approval	032023
226.	07/1983	Handwritten Notes	032024 - 032026
227.	07/05/1983	Planning Commission Meeting • Notice of Public Hearing, Affidavit of Mailing and Posting Notice of Hearing, and Proof of Publication • Agenda • Staff Report • Action of the Planning Commission	032027 – 032037
228.	07/19/1983	Planning Commission Meeting • Staff Report • Action of the Planning Commission • Minutes	032038 - 032050
229.	07/19/1983	Resolution 83-67 – A Resolution of the Planning Commission Recommending that the City Council Conditionally Approve Tentative Parcel Map No. 82-832	032051 - 032052

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230.	08/03/1983	City Council Meeting • Action of the City Council	032053 - 032054
231.	08/17/1983	City Council Meeting • Notice of Public Hearing • Administrative Report • Action of the City Council	032055 - 032069
232.	09/07/1983	City Council Meeting • Administrative Report • Action of the City Council • Excerpt of Meeting Minutes	032070 - 032090
233.	09/21/1983	City Council Meeting • Action of the City Council	032091
234.	09/21/1983	Resolution 138-83 – A Resolution of the City Council Conditionally Approving Tentative Parcel Map No. 82-832	032092 - 032097
235.	09/1983	Handwritten Notes Regarding Meeting	032098
236.	09/1983	Document Titled "Conditions of Approval"	032099
237.	09/22/1983	Notice of Determination Regarding Tentative Parcel Map No. 82-832 San Juan Partnership	032100 - 032109
238.	11/09/1983	Letter from Edward Putz to State Board of Registration for Geologists	032110 - 032114
239.	1984	2R Engineering Invoices and Payments by the City of San Clemente	032115 - 032146
240.	01/04/1984	City Council Meeting • Action of the City Council	032147 – 032148
241.	01/10/1984	Letter from Pauline Jordan to City Council Regarding Avenida San Juan Proposal	032149
242.	01/18/1984	City Council Meeting • Correspondence Received • Action of the City Council	032150 – 032157

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243.	01/24/1984	San Juan Partnership Tentative Parcel Map Meeting Sign In List	032158
244.	01/25/1984	Memo from Edward Putz to George Caravalho Regarding Avenida San Juan Partnership and Concerned Homeowners	032159
245.	02/01/1984	City Council Meeting • Action of the City Council	032160
246.	03/13/1984	Letter from Pauline Jordan to City Council Regarding Presenting Geological Report	032161 – 032164
247.	03/14/1984	Letter from Pauline Jordan to City Council Regarding New Evidence	032165 – 032172
248.	03/16/1984	Report from Converse Consultants to Pauline Jordan Regarding Proposed 3+/- Acre Avenida San Juan Subdivision	032173 - 032176
249.	03/1984	Excerpt of Converse Consultants Report Regarding Data Reviewed and Summary of Pertinent Information	032177 - 032182
250.	03/21/1984	City Council Meeting • Action of the City Council (Regarding Geological Information re Tentative Parcel Map 82-832) • Action of the City Council (Regarding Tentative Parcel Map 82-832)	032183 - 032186
251.	03/22/1984	Memo from George Carvalho to Harry Weinroth Regarding East San Juan Partnership Development	032187
252.	04/13/1984	Letter from Owen Geotechnical to Avenida San Juan Partnership Regarding Response to Third Party Geotechnical Review	032188 - 032192
253.	04/17/1984	Letter from 2R Engineering to City of San Clemente Regarding Comments Pertaining to San Juan Subdivision	032193 - 032194
254.	04/18/1984	City Council Meeting • Administrative Report • Memo from City Manager to City Council • Letter from Engineering Firms to City • Action of the City Council	032195 - 032210

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255.	05/02/1984	City Council Meeting • Administrative Report • Correspondence Received • Action of the City Council	032211 - 032259
256.	05/03/1984	Letter of Intent to City Council	032260
257.	05/16/1984	City Council Meeting • Action of the City Council	032261
258.	05/17/1984	Letter from Mario Mainero to Edward Putz Regarding Avenida San Juan Partnership	032262 - 032264
259.	06/18/1984	Memo from Edward Putz to Dean Porter Regarding Cancellation of Invoice Nos 12245 and 12255	032265
260.	06/22/1984	Report by Converse Consultants to Pauline Jordan Regarding Possible Misinterpretation of Geotechnical Review Letter Prepared by CCI, March 16, 1984	032266 - 032267
261.	07/05/1984	Grant of Easement	032268 - 032270
262.	08/29/1985	Letter from Jon Kottke to Planning Commission Requesting Extension of Tentative Parcel Map Number 82-832	032271
263.	09/12/1985	Notice of Exemption	032272 - 032273
264.	09/17/1985	Planning Commission Meeting • Staff Report	032274 - 032276
265.	10/01/1985	Planning Commission Meeting • Staff Report	032277 – 032283
266.	10/08/1985	Letter from Pauline Jordan to Mr. Kweskin	032284 - 032285
267.	10/10/1985	Memo from M. Akram Hindiyeh to File Regarding Avenida San Juan Partnership	032286 - 032287

File #	Date	Description	Page(s) ("AR")
268.	10/15/1985	Planning Commission Meeting • Staff Report • Memo from Civil Engineering to File • Action of the Planning Commission	032288 - 032293
269.	10/15/1985	Resolution 85-88 – A Resolution of the Planning Commission Recommending that the City Council Approve a One Year Time Extension from October 15, 1985 to October 15, 1986 for Tentative Parcel Map No. 82-832	032294 – 032298
270.	11/20/1985	City Council Meeting • Administrative Report • Correspondence Received • Action of the City Council	032299 – 032309
271.	11/27/1985	Letter from City Clerk to Avenida San Juan Partnership Enclosing Copy of Agenda and Administrative Report Regarding December 4, 1985 Meeting	032310
272.	12/04/1985	City Council Meeting • Notice of Public Hearing, with Proof of Publication and Affidavit of Mailing, and Mailing List • Administrative Report • Action of the City Council Regarding Request for One Year Time Extension – Tentative Parcel Map 82-832, San Juan Partnership • Speaker Cards	032311 – 032344
273.	12/16/1985	Letter from Thomas O'Keefe to City Council Regarding One Year Extension, with Attached Cover Memo	032345 - 032347
274.	01/15/1986	City Council Meeting • Action of the City Council	032348 – 032349
275.	08/24/2006	Tentative Parcel Map	032350
276.	08/28/2006	Preliminary Title Report	032351 - 032368

File #	Date	Description	Page(s) ("AR")
277.	09/01/2006	Project Application Regarding Avenida San Juan	032369 - 032384
278.	2006	Topography Map with Notes	032385
279.	09/13/2006	Preliminary Title Report	032386 - 032405
280.	09/25/2006	Email from Paul Douglas to Christopher Wright Regarding Avenida San Juan	032406
281.	10/23/2006	Letter from Sean Nicholas to Paul Douglas Regarding 404 E. Avenida San Juan	032407
282.	11/15/2006	Letter from Paul Douglas, Pacific Environmental to Sean Nicholas Regarding 404 E Avenida San Juan	032408
283.	12/20/2006	Letter from Sean Nicholas to Paul Douglas Regarding TPM 2005-229, GPA 06-428, ZA 06-429, SPP 06-430, and CUP 04-431 for the Subdivision of One Parcel Into Four Parcels at 404 E. Avenida San Juan	032409
284.	01/24/2007	Radius Map Report and Address Labels	032410 - 032413
285.	01/25/2007	Letter of Certification Regarding Posting Public Notice	032414
286.	01/29/2007	Letter from Christopher Prussak to Planning Commission Regarding Proposed Development at Parcel #2005-229, 404 East Avenida San Juan (Unsigned)	032415 – 032419
287.	01/29/2007	Letter from Christopher Prussak to Planning Commission Regarding Proposed Development at Parcel #2005-229, 404 East Avenida San Juan (Signed)	032420 – 032429
288.	02/2007	Handwritten Site Visit Notes	032430
289.	02/2007	Letter from Pauline Jordan to Sean Nicholas Enclosing Information Regarding 404 E. Avenida San Juan	032431 - 032438
290.	02/2007	Letter from Maurice Polak to Planning Commission Regarding Tentative Parcel Map 2005-229, San Juan Subdivision	032439
291.	02/05/2007	Letter from Carolyn Rice to Planning Commission Regarding Proposed Development at Parcel 2005-229	032440
292.	02/05/2007	Letter from Stephen Grayer to Planning Commission Regarding Proposed Development at Parcel 2005-229	032441 - 032442

File #	Date	Description	Page(s) ("AR")
293.	02/05/2007	Letter from Craig Keshishian to Planning Commission Regarding Proposed Development at Parcel 2005-229	032443 - 032448
294.	02/06/2007	Letter from Lawrence & Bettie Resch to Planning Commission Regarding Proposed Development at Parcel 2005-229, 404 E. Avenida San Juan	032449 - 032451
295.	02/07/2007	Draft Resolution 07- 006 with Handwritten Notes	032452 - 032455
296.	02/07/2007	Planning Commission Meeting • Notice of Public Hearing • Staff Report • Excerpt of Planning Commission Meeting Minutes	032456 - 032476
297.	02/07/07	Resolution No. 07-006 – A Resolution of the Planning Commission Recommending Denial of Tentative Parcel Map (TPM) 2005-229, General Plan Amendment (GPA) 06-428, Zoning Amendment (ZA) 06-429, Site Plan Permit (SPP) 06-430, Conditional Use Permit (CUP) 06-431, and Variance (VAR) 07-045, San Juan Subdivision, Located at 404 East Avenida San Juan	032477 - 032480
298.	02/08/2007	Article in Orange County Register Titled "Slope Near 1984 Landslide Won't Be Developed"	032481 - 032482
299.	03/30/2007	Email from Leslie Haight to Sean Nicholas Regarding San Gabriel Calls for Service	032483 - 032489
300.	04/10/2007	Letter to Thomas O'Keefe Enclosing Agenda Report	032490
301.	04/11/2007	Fax from City Clerk to Planning Commission Attaching Applicant's Request to Continue Hearing on Item	032491 - 032492
302.	04/17/2007	City Council Meeting • Notice of Public Hearing, with Affidavits of Posting and Mailing, and Radius Report • Meeting Agenda • Agenda Report • Correspondence Received Concerning Hearing Item • Excerpt of Minutes (Hearing Item Continued at Request of Applicant)	032493 - 032574

File #	Date	Description	Page(s) ("AR")
303.	04/25/2007	Letter from Pauline Jordan to City Regarding 404 E. Avenida San Juan Proposed Lot Split and Zone Change	032575 - 032591
304.	04/25/2007	Letter from Thomas O'Keefe to City Clerk Regarding Continuance of Hearing on Agenda Item	032592
305.	05/25/2007	Letter from Thomas O'Keefe to City Clerk Regarding Continuing Hearing on Agenda Item	032593 - 032594
306.	06/05/2007	City Council Meeting • Notice of Continued Public Hearing • Meeting Agenda • Agenda Report • Excerpt of Meeting Minutes	032595 - 032643
307.	07/10/2007	Letter from Pauline Jordan to Sean Nicholas Regarding Attached Meeting Notice	032644 - 032645
308.	07/18/2007	Letter from Christopher Prussak to City Council Regarding Proposed Development at Parcel #2005-229, 404 East Avenida San Juan	032646 – 032647
309.	07/22/2007	Letter from Thomas O'Keefe to City Council Regarding 404 E. Avenida San Juan, with Handwritten Notes	032648 - 032669
310.	07/22/2007	Letter from Thomas O'Keefe to City Council Regarding 404 E. Avenida San Juan	032670 - 032672
311.	07/22/2007	Response to Staff Agenda Report from Thomas O'Keefe	032673 - 032691
312.	07/23/2007	Documents Submitted to City: • 10/10/1982 - Excerpt of Geotechnical Report by Gregory Axten Regarding Avenida San Juan Partnership Property • 07/05/1984 – Grant of Easement • 07/11/07 – Article on Housing Shortage • Aerial Map	032692 - 032698

File #	Date	Description	Page(s) ("AR")
313.	07/24/2007	City Council Meeting • Notice of Public Hearing and Proof of Publication • Affidavits of Mailing and Posting Notice of Public Hearing, with Radius Report • Meeting Agenda • Letters to Tom O'Keefe, Paul Douglas, and Pauline Jordan Regarding Public Hearing • Agenda Report • Correspondence Received by City • Presentation Slides Regarding San Juan Subdivision – Proposed General Plan and Zoning Ordinance Amendment and Other Entitlements Including a Variance Associated with Subdivision at 404 East Avenida San Juan • Photographs and Documents Presented by Tom O'Keefe at the City Council Meeting • Excerpt of City Council Meeting Minutes • Hearing Transcript	032699 - 032857
314.	07/24/2007	Resolution No. 07-49 – A Resolution of the City Council Denying General Plan Amendment (GPA) 06-428, Zoning Amendment (ZA) 06-429, Tentative Parcel Map (TPM) 2005-229, Site Plan Permit (SPP) 06-430, Conditional Use Permit (CUP_ 06-431, and Variance (VAR) 07-045, San Juan Subdivision, Located at 404 East Avenida San Juan	032858 – 032862
315.	08/01/2007	Letter from Thomas O'Keefe to Jeff Oderman Regarding Stipulation	032863 - 032874
316.		City of San Clemente General Plan Map	032875
317.	02/1996	City of San Clemente Precise Zoning Map and Zone Area Sheets 15 and 20	032876 - 032879
318.	2007	San Clemente Index	032880

Exhibit 22

TRAILER PARK

Functional Role

Redevelop existing trailer park for coastal-related recreational uses.

Permitted Uses

Coastal-related recreational uses, beach, and public areas with supporting parking.

Design and Development Character

Develop a pedestrian/open space linkage to public recreation areas developed on the Marblehead Coastal property.

Circulation and Parking Improvements

Potential widening of roadway.

- Residential land use intensification could occur throughout a significant portion of the neighborhood bounded by El Camino Real, Avenida Trafalgar and the coastal bluff. This intensification could change the character of the area, eliminating much of the diversity in housing types that currently exists.

- A limited amount of residential intensification is likely along Avenida Buena Vista at the coastal bluff, and along Avenida's Montalvo and Lombiero. The character of this neighborhood could change to one of perceived higher density.

- The construction techniques used in the development of much of the inland ranch area necessitates considerable change in the natural land form. The existing and proposed residential neighborhoods make extensive use of manufactured building pads and slopes, which could degrade the overall visual character of the region.

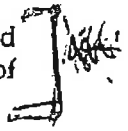
- The segregation of land uses in the inland ranch areas, i.e., the physical distance between retail and residential uses, could lead to generation of additional vehicular trips. The scale of the planned communities, or the distance between use types, is based on the use of auto transportation, resulting in a distance between land use types that discourages pedestrian usage.

- The visitor oriented, historic character Del Mar is a valuable opportunity for the City to maintain and encourage through public sponsored programs, such as the establishment of design guidelines and review procedures, architectural standards, and a streetscape enhancement and continuity plan.

- The construction of private recreational facilities, such as the proposed golf course in Talega, could significantly degrade the visual character of large sections of natural valley floor and hillside areas.

- A community workshop sponsored to generate public input to the Pier Bowl planning process produced the following generalized desirable characteristics: additional parking in the Pier Bowl, a greater number and variety of restaurants, increased directional and informational signage, additional landscaping with a connection to the Del Mar streetscape improvements, and improvement of beach public facilities.

- The mobile home park that is located on the beach frontage of Marblehead Coastal presents a significant opportunity for the long-term provision of additional beach access within the City.



- The existing locational advantages and current underutilization of property in North Beach present a significant development opportunity.

Exhibit 23

LexisNexis

11 cal app 4th 1255

Sounhein v. City of San Dimas, 11 Cal. App. 4th 1255 (Copy citation)

Court of Appeal of California, Second Appellate District, Division Five
December 21, 1992, Decided
No. B063720

Reporter: 11 Cal. App. 4th 1255 | 14 Cal. Rptr. 2d 656 | 1992 Cal. App. LEXIS 1468 | 92 Cal. Daily Op. Service 10252 | 92 Daily Journal DAR 17153

EARL SOUNHEIN et al., Plaintiffs and Respondents, v. CITY OF SAN DIMAS, Defendant and Appellant.

Prior History: Superior Court of Los Angeles County, No. BS002509, Ronald M. Sohigian, Judge.

Disposition: The judgment is affirmed.

Core Terms

ordinance, public hearing, second unit, zoning, public notice, zoning ordinance, notice, first application, conditional use permit, city council, requisite, revise

Case Summary

Procedural Posture
Appellant city sought review of the decision of the Superior Court of Los Angeles County (California), which granted a peremptory writ of mandate and found appellant's zoning ordinance void because appellant, in response to respondent residence owners' application, did not provide public notice and hearings under Cal. Gov't Code § 65853 and did not timely adopt the ordinance after receiving the first application under Cal. Gov't Code § 658522(b).

Overview
Respondents residence owners wanted to add an apartment onto their home. Appellant city advised respondent to apply for a conditional use permit, pursuant to Cal. Gov't Code § 65852.2. After respondents submitted a revised plan, appellant enacted an ordinance which banned second unit accessory apartments. The court affirmed the finding of the trial court, which severed respondents' action for a writ of mandate under Cal. Civ. Proc. Code § 1085 from those for declaratory relief, and granted the peremptory writ of mandate. The court found that under Cal. Gov't Code § 65853, appellant was required to provide public notice and hearings prior to adopting a zoning ordinance because the regulation had not been previously imposed. The court found that, because appellant had no prior absolute prohibition on second units, the failure of appellant to provide the requisite notice and hearings rendered the ordinance void. The court also found the ordinance void because it was not adopted within 120 days of the date of appellant's receipt of respondent's first application, not its revised plan, for a conditional use permit by respondents, as required under Cal. Gov't Code § 658522(b).

Outcome
The court affirmed the grant of the peremptory writ of mandate which ordered appellant city to vacate an ordinance which banned any second independent residential unit on any lot in the city. The court ordered appellant to process an application by respondent residence owners for a conditional use permit because appellant had not provided public notice and hearings and had not timely enacted the ordinance after it received a first application.

LexisNexis® Headnotes -Hide

Governments > Local Governments > Ordinances & Regulations

HN1 Cal. Gov't Code § 65853 requires public notice and public hearings in connection with the adoption of most zoning ordinances. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Real Property Law > Zoning

HN2 See Cal. Gov't Code § 65853. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Writs > Common Law Writs > Mandamus
Governments > Local Governments > Ordinances & Regulations

HN3 Cal. Gov't Code §§ 65854-65857 require specified types of public notice and public hearings before the planning commission and the city council. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Real Property Law > Zoning > General Overview

HN4 The failure of a city to provide the requisite notice and hearing procedures cannot be deemed harmless or nonprejudicial. Cal. Gov't Code § 65010(b). The failure to provide notice and public hearings is not a mere minor technical defect, but rather the process is fundamentally flawed by a complete omission of any public notice or hearings when adopting a zoning ordinance. *Shepardize* - Narrow by this Headnote

Governments > Local Governments > Ordinances & Regulations
Real Property Law > Zoning > Variances

HN5 See Cal. Gov't Code § 65852.2(b). *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview
Governments > Local Governments > Licenses

HN6 Substantial evidence which supports a trial court's determination may not be set aside on appeal. *Shepardize* - Narrow by this Headnote

Headnotes/Syllabus -Hide

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A couple wanted to build an accessory rental apartment on their property, and they applied for a conditional use permit pursuant to Gov. Code, § 65852.2 (second residential units). The city responded by requesting further information, and by noting that certain items in the couple's plan had to be revised in order to conform with applicable zoning regulations. The couple subsequently submitted a revised site plan for the conditional use permit. However, in response to the couple's application, the city enacted an ordinance that banned second unit accessory apartments. The couple then brought an action for a writ of mandate (Code Civ. Proc., § 1085) and for declaratory relief. The trial court severed the mandate proceedings from those for declaratory relief, and entered judgment for the couple, granting the peremptory writ of mandate. (Superior Court of Los Angeles County, No. BS002509, Ronald M. Sohigian, Judge.)

The Court of Appeal affirmed. It held that enactment of the city ordinance was improper, and that the ordinance was void, since the city failed to give public notice or hold public hearings, as required by Gov. Code, § 65853 et seq. (adoption of zoning ordinances, public notice, and hearings). The court further held that the ordinance was not adopted within the 120-day statutory time limit (Gov. Code, § 65852.2, subd. (b)). The court held that for purposes of computing the limitations period, the fact that the couple's initial application was incomplete was not determinative, since the plain language of the statute does not specify a completed application. (Opinion by Boren, J., with Turner, P. J., and Grignon, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

CA(1) (1)
Zoning and Planning § 17 > Enactment, Amendment, and Repeal of Zoning Plans and Regulations > Zoning and Subdivision Ordinances and Regulations > Public Notice and Hearing Requirements > Applicability of Exception.

--Enactment of a city ordinance banning second unit accessory apartments in response to a couple's application for a conditional use permit to build such an apartment was improper, and the ordinance was rendered void, where the city failed to give public notice or hold public hearings, as required by Gov. Code, § 65853 et seq. (adoption of zoning ordinances, public notice, and hearings). The city was not statutorily excepted from the notice and hearing requirements under Gov. Code, § 65853 (exception for zoning ordinances "theretofore imposed"), on the ground that its ordinance was merely adopted to set forth the findings that were already imposed, since the city had no absolute prohibition on second units prior to enactment of the new ordinance. Accordingly, the new ordinance's complete ban on any second independent residential unit on any lot in the city without regard to parcel size or zoning constituted a marked change from the prior zoning code, imposed a restriction not theretofore imposed, and required the public notice and hearings that the city failed to provide.

[See 8 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 836.]

CA(2) (2)
Zoning and Planning § 17 > Enactment, Amendment, and Repeal of Zoning Plans and Regulations > Zoning and Subdivision Ordinances and Regulations > Public Notice and Hearing Requirements > Effect of Noncompliance.

--A city's failure to provide the requisite notice and hearing procedures (Gov. Code, § 65853 et seq.) before enacting an ordinance banning second unit accessory apartments, in response to a couple's application for a conditional use permit to build such an apartment, was not harmless, or nonprejudicial, or a mere minor technical defect, and the ordinance was therefore void. The enactment process was fundamentally flawed by the complete omission of any public notice or hearings when adopting the zoning ordinance. Although the couple was notified of the city council's proposed action and afforded an opportunity to be heard, other residents of the city affected by the ordinance were not given notice and an opportunity to be heard, thus resulting in a total deprivation of basic zoning procedural safeguards for the community.

CA(3) (3)
Zoning and Planning § 17 > Enactment, Amendment, and Repeal of Zoning Plans and Regulations > Zoning and Subdivision Ordinances and Regulations > Time Limit for Enactment of Ordinance > Effect of Noncompliance.

--A city ordinance banning second unit accessory apartments, enacted in response to a couple's application for a conditional use permit to build such an apartment, was void, where the ordinance was not adopted within the applicable statutory time limit. Gov. Code, § 65852.2, subd. (b), provides that a local agency must approve or disapprove a conditional use permit application unless it adopts an ordinance regulating or precluding accessory apartments within 120 days after first receiving the application. However, the city adopted its ordinance 151 days after the couple submitted its first application. The fact that the couple's initial application was incomplete was not determinative, since

the plain language of the statute does not specify a completed application. Moreover, the statute by its very terms focuses on when the city "receives" the first application (Gov. Code, § 65852.2, subd. (b)), rather than when the application is completed, since a conditional use permit procedure can entail conferring with city personnel, along with a process of modifying and adjusting the permit application.

CA(4) (4)
Zoning and Planning § 17 > Enactment, Amendment, and Repeal of Zoning Plans and Regulations > Zoning and Subdivision Ordinances and Regulations > Limitations for Enactment of Ordinance > Evidence of Noncompliance.

--The trial court properly ordered a city to vacate its ordinance banning second residential units, which it enacted in response to a couple's application for a conditional use permit, where substantial evidence supported the trial court's determination that the ordinance was not timely enacted. The issue of whether the couple's incomplete application for a conditional use permit constituted a "first application" under Gov. Code, § 65852.2, subd. (b), thereby commencing that statute's period of limitations for enactment of the ordinance, was a question of fact. Substantial evidence supported the trial court's determination in favor of the couple, and that determination could not be set aside on appeal. Despite the application's incompleteness, the city did not deem the application withdrawn; rather, the city merely requested that further information be provided, and specifically suggested that plans be revised or that a variance application also be submitted. Furthermore, the couple's response was characterized by the city as a "revised site plan" for a second unit, and was designated with the same case number identifying the project, indicating not a new application but the completion of the initial application.

Counsel: Brown, Winfield & Canzoneri and Mark W. Steres for Defendant and Appellant. Barbosa, Garcia & Barnes and Douglas D. Barnes for Plaintiffs and Respondents.

Judges: Opinion by Boren, J., with Turner, P. J., and Grignon, J., concurring.

Opinion by: BOREN, J.

Opinion

[1258] The City of San Dimas (hereinafter, the city) appeals following a judgment granting a peremptory writ of mandate which ordered the city to set aside and vacate its Ordinance No. 941, which banned any second independent residential unit on any lot in the city, [1] and to process the application by Earl and Alana Sounhein (hereinafter, the Sounheins) for a conditional use permit, and reasonable modifications and amendments thereto. We find that the city failed to give the requisite public notice and to hold required public hearings before adopting Ordinance No. 941 and failed to adopt the ordinance within the required 120-day period after receiving its first application for a conditional use permit, and that the trial court properly granted the writ of mandate.

FACTS

The Sounheins own a home in the city and wanted to build on their property a second unit, an accessory rental apartment. The Sounheins' property is in an area of the city zoned for duplexes. The city advised the Sounheins that they would not grant approval for them to build a second unit but suggested that they apply for a conditional use permit pursuant to the provisions of Government Code section 65852.2. [2]

The Sounheins revised their plans and on February 9, 1990, submitted an application for a conditional use permit and the requisite application fee. The city acknowledged receipt of their application but informed them it was incomplete. The city requested that the Sounheins provide further information regarding a more complete legal description of the property, two appropriate scaled print maps, twelve prints of the development plan and scaled drawings of the exterior elevations. The city also noted to the Sounheins that several items regarding setback and square footage did not **[1259]** comply with

existing regulations and that their plans had to be revised to conform with applicable zoning regulations or a variance application also had to be submitted.

The Sounheins thereafter met several times with city personnel, submitted additional documents, revised their plans and on May 24, 1990, submitted a revised site plan for a conditional use permit for the proposed second unit. On July 10, 1990, in response to the Sounheins' application, the city enacted Ordinance No. 941, a ban on second unit accessory apartments. The Sounheins brought an action for a writ of mandate (Code Civ. Proc., § 1085) and for declaratory relief. The trial court severed the mandate proceedings from those for declaratory relief and entered judgment for the Sounheins, granting the peremptory writ of mandate. The city appeals.

DISCUSSION

The trial court properly found that the city did not lawfully enact Ordinance No. 941 because the city (1) failed to give the requisite public notice and to hold public hearings and (2) failed to enact the ordinance within the requisite statutory time period. In view of these two independent grounds upon which the ordinance must be deemed invalid, we need not address whether the city also failed to make sufficient findings that "specific adverse impacts on the public health, safety, and welfare that would result from allowing second units within single-family and multifamily zoned areas justify adopting the ordinance." (§ 65852.2, subd. (c).) [3]

I. *Requisite Notice and Required Public Hearings*

HN1 ***CA(1)*** (1) Section 65853 requires public notice and public hearings in connection with the adoption of most zoning ordinances and provides, in pertinent part, as follows: ***HN2*** "A zoning ordinance or an amendment to a zoning ordinance, which amendment ... imposes any regulation listed in Section 65850 not theretofore imposed or removes or modifies any such regulation theretofore imposed shall be adopted in the manner set forth in Sections 65854 to 65857, inclusive. Any other amendment to a zoning ordinance may be adopted as other ordinances are adopted." In general, ***HN3*** sections 65854 through 65857 require specified types of public notice and public hearings before the planning commission and the city council.

In the city's answer to the petition for a writ of mandate, the city admitted that Ordinance No. 941 "was not considered by the City Planning Commission prior to introduction and adoption by the City Council, and that **[1260]** Ordinance No. 941 was not noticed on the City Council agenda as a public hearing item." The city therefore did not give the public notice or hold public hearings as specified in sections 65854 through 65857. Instead, the city followed the procedure specified for other ordinances (see § 36931 et seq.) and satisfied other statutory requirements for agenda posting and open meetings (see § 54954.2 & 54953). The city focuses on the language "not theretofore imposed" (§ 65853) and urges that such language provides as an exception that if the amendment to the zoning ordinance imposes a regulation that has previously been imposed, the special public notice and public hearing requirements need not be met. According to the city, prior to the adoption of Ordinance No. 941, the city's zoning ordinances had already prohibited second residential units in single family and multiple family zones within the city, and the ordinance "was merely adopted to set forth the findings now being required by state law to continue prohibiting second units."

However, prior to Ordinance No. 941, the city had no absolute prohibition on second units. Prior to Ordinance No. 941, the city's zoning code permitted only one single family dwelling unit per lot in its single family residential zone, but permitted multiple dwellings on a single lot in the multifamily zone if the lot satisfied minimum lot area requirements. In contrast, Ordinance No. 941 created an absolute prohibition on second units, as is apparent from the following language of the ordinance: "Second units, as defined by Government Code Section 65852.2, are hereby prohibited in all single family and multi-family zoning districts, including Specific Plans, in the City." Accordingly, Ordinance No. 941's complete ban on any second independent residential unit on any lot in the city without regard to parcel size or zoning constituted a marked change from the prior zoning code, imposed a restriction "not theretofore imposed," and required the public notice and hearings which the city failed to provide.

CA(2) (2) Moreover, ***HN4*** the failure of the city to provide the requisite notice and hearing procedures cannot be deemed harmless or nonprejudicial. (See § 65010, subd. (b).) The failure to provide notice and public hearings was not a mere minor technical defect (cf. *Hayssen v. Board of Zoning Adjustments* (1985) 171 Cal.App.3d 400, 407-408 [217 Cal.Rptr. 464]; *Mack v. Ironside* (1973) 35 Cal.App.3d 127, 131 [110 Cal.Rptr. 557]), but rather the process was fundamentally flawed by the complete omission of any public notice or hearings when adopting the zoning ordinance. (See *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 64 [107 Cal.Rptr. 214], disapproved on other grounds in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596, fn. 14 [135 Cal.Rptr. 41, 557 P.2d 473].) The Sounheins were notified of the city council's proposed action and afforded **[1261]** an opportunity to be heard. However, the other residents of the city affected by the ordinance were not given notice and an opportunity to be heard and to have their concerns, needs and welfare considered by both the planning commission and the city council at public hearings, thus amounting to more than a mere technical, procedural omission and reflecting a total deprivation of basic zoning procedural safeguards for the community. The absence of the required public notice and public hearings thus renders Ordinance No. 941 void.

II. *Failure to Adopt Ordinance No. 941 Within the Time Allowed by Law*

CA(3) (3) Ordinance No. 941 is also void for the independent reason that it was not adopted within the time allowed by law. ***HN5*** Pursuant to section 65852.2, subdivision (b), "When a local agency ... receives its *first application* ... for a conditional use permit ... the local agency shall accept the application and approve or disapprove the application pursuant to this subdivision unless it adopts an ordinance in accordance with subdivision (a) or (c) [regulating or precluding accessory apartments] within 120 days after receiving the application." The Sounheins submitted that "first application" and did so on February 9, 1990. The city did not adopt Ordinance No. 941 until July 10, 1990, 151 days later, and therefore after the statutory 120 days during which a valid ordinance could have been adopted.

The city urges that the statutory phrase "first application" means the first completed application and contends that the February 9, 1990, application by the Sounheins was "essentially withdrawn" and a new application for a second unit then submitted on May 24, 1990, resulting in the adoption of the ordinance within the requisite 120-day time period. Although one court characterized as "the interesting question" (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 560 [7 Cal.Rptr.2d 848]) whether an incomplete application can trigger the requirement that the city adopt its own ordinance within 120 days of the "first application," the plain language of the statute does not specify a completed application. The statute also by its very terms focuses on when the city "receives" (§ 65852.2, subd. (b)) the first application, rather than when it is completed, and the conditional use permit procedure obviously can entail, as it did here, conferring with city personnel and a process of modifying and adjusting the permit application.

CA(4) (4) Moreover, the issue of whether the Sounheins' February 9, 1990, submission constituted a "first application" under section 65852.2, subdivision (b), is also a question of fact. The court below, as the trier of fact, determined that factual question in favor of the Sounheins. ***HN6*** Substantial evidence supports the trial court's determination, and it may not be set aside **[1262]** on appeal. (*Rasmussen v. City Council* (1983) 140 Cal.App.3d 842, 848 [190 Cal.Rptr. 1].) The evidence regarding the city's response to the Sounheins' February 9, 1990, conditional use permit application indicates that despite the incomplete and modifiable nature of the application, the city did not deem the application withdrawn. Rather, the city, in its February 28, 1990, response to the application, merely requested that further information be provided and specifically suggested that the plans be revised and modified to conform to applicable zoning regulations or that a variance application also be submitted. Indeed, the Sounheins' response on May 24, 1990, was characterized by the city in their letter of acknowledgment as constituting a "revised site plan" for the proposed second unit and was designated with the same case number identifying the project, indicating not a new application but the completion of the application filed on February 9, 1990.

Significantly, the precise nature or dimension of the second unit contemplated by an applicant is of relatively little concern to a city which wishes to prohibit any second units whatsoever. Thus, the details or the completeness of the application have no logical bearing on the effective date of the receipt of the first application for the purposes of notice to the city for the running of the 120-day time period. Since the city acknowledged receipt of an application to construct a second unit or accessory apartment on February 9, 1990, but failed to act within the time allowed by section 65852.2, the city is required to process the Sounheins' application under the standards set forth in section 65852.2, subdivision (b).

DISPOSITION

The judgment is affirmed.

Turner, P. J., and Grignon, J., concurred.

Footnote 1

Ordinance No. 941 provides, in pertinent part, as follows: "Second units, as defined by Government Code Section 65852.2, are hereby prohibited in all single family and multi-family zoning districts, including Specific Plans, in the City." Second units, sometimes referred to as accessory apartments, are defined in Government Code section 65852.2, subdivision (d)(3) as: "[A]n attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is situated."

Footnote 2

Unless otherwise specified, all further statutory references are to the Government Code.

Footnote 3

The trial court's ruling also did not address whether there was sufficient evidence of specific adverse impacts, or whether the recitation of adverse impacts in the ordinance itself was merely conclusory speculation.

Exhibit 24

Lexis Advance

505 us 1003

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (Copy citation)

Supreme Court of the United States
March 2, 1992, Argued ; June 29, 1992, Decided
No. 91-453

Reporter: 505 U.S. 1003 | 112 S. Ct. 2886 | 120 L. Ed. 2d 798 | 1992 U.S. LEXIS 4537 | 60 U.S.L.W. 4842 | 34 ERC (BNA) 1897 | 92 Daily Journal DAR 9030 | 22 ELR 21104 | 6 Fla. L. Weekly Fed. S 715

DAVID H. LUCAS, PETITIONER v. SOUTH CAROLINA COASTAL COUNCIL

Prior History: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

Disposition: 304 S. C. 376, 404 S. E. 2d 895, reversed and remanded.

Core Terms

property, regulate, owner, compensation, land, law, rule, public, economic, nuisance, prohibit, value, deprive, harm, require, constitute, government, power, development, permit, principle, categorical, decision, prevent, claim, legislative, legislature, total, regulatory, protect

Case Summary

Procedural Posture
Petitioner landowner sought review of the judgment of the Supreme Court of South Carolina concluding that petitioner was not entitled to compensation from the State under the Takings Clause of the Fifth Amendment.

Overview
The landowner purchased two residential lots on which he intended to build homes. In 1988, State enacted the Beachfront Management Act, S. C. Code Ann. § 48-39-250 et seq., which barred the landowner from erecting any permanent habitable structures on his two parcels. A state trial court found that this prohibition rendered the landowner's parcels valueless. The landowner asserted the effect of the Act on the value of the lots accomplished a taking under the Fifth and Fourteenth Amendments. The court held that where a state seeks to sustain a regulation that deprives land of all economically beneficial use, it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate showed that the proscribed use interests were not part of his title to begin with.

Outcome
The court reversed the judgment of the state supreme court denying compensation to the landowner under the Takings Clause of the Fifth Amendment and remanded the case because the regulation's effect on the landowner's property value was relevant.

LexisNexis® Headnotes -Hide

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN1 At least two discrete categories exist of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general

(at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, the Supreme Court of the United States has required compensation. The second situation in which the Supreme Court of the United States has found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. *Shepardize* - Narrow by this Headnote

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review
Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Inverse Condemnation > General Overview
Real Property Law > Inverse Condemnation > Regulatory Takings

HN3 The test to be applied in considering a facial takings challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Mining > Surface Rights
Real Property Law > Zoning > Constitutional Limits

HN2 The Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Governments > Police Powers
Real Property Law > Inverse Condemnation > Regulatory Takings
Real Property Law > Inverse Condemnation > Remedies

HN4 Where a state reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Inverse Condemnation > Regulatory Takings

HN5 Land-use regulation does not effect a taking if it substantially advances legitimate state interests. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN6 A given restraint will be seen as mitigating harm to the adjacent parcels or securing a benefit for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN7 Where a state seeks to sustain regulation that deprives land of all economically beneficial use, it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > ... > Limited Use Rights > Easements > Public Easements
Real Property Law > Water Rights > Riparian Rights

HN8 Where permanent physical occupation of land is concerned, the Supreme Court of the United States refuses to allow the government to decree it anew (without compensation), no matter how weighty the asserted public interests involved, though it assuredly will permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Encumbrances > Adjoining Landowners > General Overview
Real Property Law > Torts > General Overview
Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

HN9 Regulations that prohibit all economically beneficial use of land cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the state's law of private nuisance, or by the state under its complementary power to abate nuisances that affect the public generally, or otherwise. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Inverse Condemnation > Regulatory Takings

HN10 When a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it. *Shepardize* - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Environmental Law > Land Use & Zoning > Eminent Domain Proceedings
Real Property Law > Inverse Condemnation > Regulatory Takings

HN11 Where the regulation has already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *Shepardize* - Narrow by this Headnote

Lawyers' Edition Display - Hide

Decision

South Carolina court held to have applied wrong standard in determining whether state beachfront management statute, by barring construction, effected "taking" of property under Fifth Amendment.

Summary

Under 1977 legislation, the state of South Carolina required owners of certain "critical area" coastal-zone land to obtain a permit from a coastal council before changing the use of the land. In 1986, a developer purchased two lots on a barrier island--which lots did not then qualify as a "critical area" and were zoned for single-family residential construction--and made plans to erect such residences on the lots. In 1988, however, the state enacted a Beachfront Management Act (BMA) which established a new baseline on the island and prohibited any construction of occupable improvements

seaward of a line parallel to and 20 feet landward of the baseline, thereby barring the developer's plans. The developer, filing suit against the council in the South Carolina Court of Common Pleas, did not challenge the validity of the BMA as an exercise of the state's police power, but contended that the BMA's complete extinguishment of the value of his property effected a "taking" of the property for which he was entitled to just compensation. The Court of Common Pleas found that the BMA decreed a permanent ban on construction on the developer's lots, where there had been no restrictions on such use before, and had thereby deprived the developer of any reasonable economic use of the lots, rendering the lots valueless; accordingly, the court ordered the council to pay just compensation of more than $ 1.2 million. While the case was pending before the Supreme Court of South Carolina, the BMA was amended to authorize the council, in certain circumstances, to issue special permits for construction of habitable structures seaward of the baseline. The Supreme Court of South Carolina, reversing the judgment of the Court of Common Pleas, held that (1) in the absence of an attack on the validity of the BMA as such, the court was bound to accept the state legislature's uncontested findings that new construction in the coastal zone threatened a public resource; and (2) when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owed regardless of the regulation's effect on the property's value (304 SC 376, 404 SE2d 895).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and White, O'Connor, and Thomas, JJ., it was held that (1) the decision below was ripe for review, even though the BMA had been amended to allow the issuance of special permits and even though Supreme Court precedents reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of regulations purporting to limit such development, because although the above considerations would preclude review had the court below rested its judgment on ripeness grounds, that court had instead disposed of the developer's claim on the merits; (2) where a state seeks to sustain a regulation that deprives land of all economically beneficial use, the state may resist an asserted right to compensation under the takings clause, on the theory that there has been no "taking," only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with, so that the severe limitation on property use is not newly legislated or decreed, but inheres in the title itself through the restrictions that background principles of the state's law of property and nuisance already place upon land ownership; (3) the court below therefore erred in rejecting the developer's claim on the merits on the basis of the state legislature's recitation of a noxious-use justification for the BMA; and (4) the case would be remanded for a determination of the state-law question whether common-law principles would have prevented the erection of any habitable or productive improvements on the developer's land.

Kennedy, J., concurred in the judgment, expressing the view that (1) the issues presented in the case were ready for the Supreme Court's decision; (2) although the trial court's finding that the developer's property had been rendered valueless was questionable, the Supreme Court--unlike the court below on remand--had to accept the finding as entered; (3) nuisance prevention accorded with the most common expectations of owners who faced regulation, but was not the sole source of state authority to impose severe restrictions; and (4) the court below erred by reciting the general purposes for which the BMA was enacted without a determination that those purposes were in accord with the owner's reasonable expectations, and therefore sufficient to support a severe restriction on specific parcels of property.

Blackmun, J., dissented, expressing the view that (1) the case was not ripe for review; (2) even if there were no jurisdictional barrier, it was unwise to decide issues based on the erroneous factual premise that regulation had rendered the subject property entirely valueless; (3) the court's decision improperly placed on state legislatures the burden of showing that their legislative judgments are correct; and (4) previous takings clause jurisprudence rested on the principle that a state has full power to prohibit an owner's use of property without compensation if such use is harmful to the public, with the determination of harmfulness resting on legislative judgment rather than on common-law nuisance principles.

Stevens, J., dissented, expressing the view that (1) the developer was not entitled to an adjudication of the merits of his permanent takings claim under the amended BMA until he exhausted his right to apply for a special permit; (2) it was not clear whether the developer had a viable "temporary taking" claim under the preamendment BMA; (3) the doctrine of judicial restraint, under which the Supreme

Court will not anticipate a question of constitutional law in advance of the necessity of deciding, properly applied to the case at hand; (4) a categorical rule that total regulatory takings must be compensated was unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified; and (5) the court's nuisance exception unwisely froze state common law and denied legislatures their traditional power to revise the law governing the rights and uses of property.

Souter, J., would have dismissed the writ of certiorari in the case as improvidently granted, because the case came to the Supreme Court on an unreviewable assumption--that the BMA deprived the developer of his entire economic interest in the property at issue--that was both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Supreme Court's ability to render certain the legal premises on which the court's holding rested.

Headnotes

EMINENT DOMAIN §47 > taking -- land-use regulation -- abating nuisance -- property rights --

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]***LEdHN[1D]*** [1D]***LEdHN[1E]*** [1E]
LEdHN[1F] [1F]***LEdHN[1G]*** [1G]***LEdHN[1H]*** [1H]***LEdHN[1I]*** [1I]

Where a state seeks to sustain a regulation that deprives land of all economically beneficial use, the state may resist an asserted right to compensation under the takings clause of the Federal Constitution's Fifth Amendment, on the theory that there has been no "taking," only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with, so that the severe limitation on property use is not newly legislated or decreed, but inheres in the title itself through the restrictions that background principles of the state's law of property and nuisance already place upon land ownership--based on an objectively reasonable application of relevant precedents, rather than artful, harm-preventing characterizations--and is merely duplicated by the regulation at issue; prior United States Supreme Court takings decisions which suggested that harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation were merely an early formulation of the police power justification necessary to sustain, without compensation, any regulatory diminution in property value, and "noxious use" logic cannot serve as a touchstone to distinguish regulatory "takings," which require compensation, from regulatory deprivations which do not require compensation; thus, a state appellate court--in considering a developer's claim that a state beachfront management statute, which prohibited any construction of occupable improvements on certain coastal lands, had deprived him of any economically viable use of beachfront lots which he had acquired with the intention of building single-family residences thereon, and thereby effected a "taking" of the land for which he was entitled to just compensation--errs in rejecting the developer's claim on the merits, on the theory that no compensation is owing under the takings clause regardless of a regulation's effect on property values when the regulation is designed to prevent serious public harm, for the state legislature's recitation of a noxious-use justification, in uncontested statutory findings that new coastal-zone construction threatened a public resource, cannot be the basis for departing from the categorical rule that total regulatory takings must always be compensated. (Blackmun and Stevens, JJ., dissented from this holding.)

APPEAL §386 > EMINENT DOMAIN §98 > state court decision -- review by Supreme Court -- ripeness of federal question -- land-use regulation as taking -- pleadings --

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]***LEdHN[2C]*** [2C]

A state appellate court decision--which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property--is ripe for plenary review by the United States Supreme Court on certiorari, even though the statute was amended after briefing and argument before the state appellate court to allow the issuance of special permits for construction of habitable structures on such property under certain circumstances, and even though Supreme Court precedents reflect an insistence on knowing the nature and extent of permitted development before

adjudicating the constitutionality of regulations purporting to limit such development, because (1) although the above considerations would preclude review had the state appellate court rested its judgment on ripeness grounds, the court instead disposed of the developer's takings claim on the merits; (2) this unusual disposition did not preclude the developer from applying for a permit under the amended statute and challenging any denial under the takings clause of the Federal Constitution's Fifth Amendment, but would practically and legally preclude any takings claim with respect to the loss of construction rights in the period between the statute's enactment and amendment; (3) the developer had no reason to proceed on such a "temporary taking" claim at trial, or to seek remand for that purpose prior to submission of the case to the state appellate court, because prior to the amendment the taking was unconditional and permanent; (4) given the breadth of the state appellate court's holding and judgment, the developer would be unable, absent the Supreme Court's intervention, to obtain further adjudication with respect to the period between enactment and amendment; and (5) in these circumstances, it would not accord with sound process to insist that the developer pursue the special permit procedure before his takings claim could be considered ripe, given that he had properly alleged injury-in-fact under the Constitution's Article III with respect to both the preamendment and postamendment constraints on the use of his property, and given that the state appellate court's dismissive foreclosure of further pleading and adjudication with respect to the preamendment component of the takings claim makes it appropriate to address that component as if the case were before the Supreme Court on the pleadings alone, in which posture nothing more than a proper allegation of injury-in-fact can reasonably be demanded. (Blackmun and Stevens, JJ., dissented from this holding; Souter, J., dissented in part from this holding.)

APPEAL §1692.5 > remand -- eminent domain -- change in law --

LEdHN[3A] [3A]***LEdHN[3B]*** [3B]

The United States Supreme Court--in reviewing on certiorari a state appellate court decision which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property--is not required by "prudence" or any other principle of judicial restraint to vacate the judgment below and remand for reconsideration in the light of an amendment to the statute, which amendment allowed the issuance of special permits for construction of habitable structures on such property under certain circumstances, where the state appellate court rendered its categorical disposition of the case after the statute had been amended and after the state appellate court had been invited to consider the effect of the amendment on the case. (Blackmun, J., dissented from this holding.)

EMINENT DOMAIN §98 > taking -- land-use regulation --

LEdHN[4A] [4A]***LEdHN[4B]*** [4B]***LEdHN[4C]*** [4C]

The takings clause of the Federal Constitution's Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his or her land.

EMINENT DOMAIN §47 > interests in land --

LEdHN[5A] [5A]***LEdHN[5B]*** [5B]

There are a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the takings clause of the Federal Constitution's Fifth Amendment.

APPEAL § 1087.5 > APPEAL § 1088 > issue not raised in briefs -- premise of certiorari petition

LEdHN[6A] [6A]***LEdHN[6B]*** [6B]

The United States Supreme Court--in reviewing on certiorari a state appellate court decision which held that a developer was not entitled to just compensation for an alleged "taking" of his beachfront property by means of a state beachfront management statute, which had been found by the trial court to have rendered the property valueless by barring construction of habitable structures thereon--will not consider the argument in the respondent coastal commission's brief on the merits that the trial court's finding was erroneous, where the finding was the premise of the developer's petition for certioran and was not challenged in the commission's brief in opposition to certiorari.

EMINENT DOMAIN §98 > taking -- property-use regulation --

LEdHN[7A] [7A]***LEdHN[7B]*** [7B]

The takings clause of the Federal Constitution's Fifth Amendment applies to regulation of property, as well as to physical deprivation of property.

EMINENT DOMAIN §103 > taking -- easement --

LEdHN[8] [8]

The government may assert a permanent easement that was a pre-existing limitation on the landowner's title, without being required to provide compensation under the takings clause of the Federal Constitution's Fifth Amendment.

EMINENT DOMAIN §78 > taking -- lakebed -- nuclear plant --

LEdHN[9] [9]

The owner of a lakebed is not entitled to compensation, under the takings clause of the Federal Constitution's Fifth Amendment, when the owner is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' lands, nor is the corporate owner of a nuclear power plant entitled to compensation when the owner is directed to remove all improvements from the land upon the discovery that the plant sits astride an earthquake fault, because such regulatory action, while it may have the effect of eliminating the land's only economically productive use, does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.

EMINENT DOMAIN §105 > remedy for temporary taking --

LEdHN[10A] [10A]***LEdHN[10B]*** [10B]

Under the takings clause of the Federal Constitution's Fifth Amendment, where a regulation has already worked a taking of all use of property, no subsequent action by the government, such as rescinding the regulation, can relieve the government of the duty to provide compensation for the period during which the taking was effective.

EMINENT DOMAIN §98 > NUISANCES §1 > taking -- noxious uses --

LEdHN[11] [11]

A "total taking" inquiry under the takings clause of the Federal Constitution's Fifth Amendment--which inquiry implements the rule that, where a state regulation deprives land of all economically beneficial use, the state may resist an asserted right to compensation, on the theory

that there is no "taking," only if the proscribed use interests were not part of the owner's title to begin with due to restrictions imposed by background principles of the state's law of property and nuisance--will ordinarily entail, as the application of state nuisance law ordinarily entails, analysis of, among other things, (1) the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities on the property in question, (2) the social value of the claimant's activities and their suitability to the locality in question, and (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government, or adjacent private homeowners, alike; for these purposes, the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition--although changed circumstances or new knowledge may make what was previously permissible no longer so--and so also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant. (Blackmun and Stevens, JJ., dissented in part from this holding.)

APPEAL §1750 > remand -- question to be decided --

LEdHN[12] [12]

The United States Supreme Court--having reversed on certiorari a state appellate court decision which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property--will remand the case to the state appellate court to determine the state-law question whether common-law principles would have prevented the erection of any habitable or productive improvements on the developer's land, where the Supreme Court rules that when a state regulation deprives land of all economically beneficial use, the state may resist an asserted right to compensation, on the theory that there is no "taking," only if the proscribed use interests were not part of the owner's title to begin with due to restrictions imposed by background principles of the state's law of property and nuisance.

Syllabus

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, *e.g., Agins v. City of Tiburon*, 447 U.S. 255, 261, 65 L. Ed. 2d 106, 100 S. Ct. 2138. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding $ 1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's

preamendment deprivation. Lucas has properly alleged injury in fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe. Pp. 1010-1014.

2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case. Pp. 1014-1032.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical -- and economic -- equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation. Pp. 1014-1019.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated. Pp. 1020-1026.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed -- in this setting as with all takings claims -- if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. *Cf. Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L. Ed. 126, 21 S. Ct. 48. Pp. 1027-1031.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances. P. 1031.

Counsel: A. Camden Lewis argued the cause for petitioner. With him on the briefs were Gerald M. Finkel and David J. Bederman.

C. C. Harness III argued the cause for respondent. With him on the brief were T. Travis Medlock, Attorney General of South Carolina, Kenneth P. Woodington, Senior Assistant Attorney General, and Richard J. Lazarus. ▣

Judges: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, post, p. 1032. BLACKMUN, J., post, p. 1036, and STEVENS, J., post, p. 1061, filed dissenting opinions. SOUTER, J., filed a separate statement, post, p. 1076.

Opinion by: SCALIA

Opinion

[1006] JUSTICE SCALIA delivered the opinion of the Court.

LEdHN[1A] [1A]In 1986, petitioner David H. Lucas paid $ 975,000 for two residential lots on the Isle of Palms in Charleston County, **[1007]** South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amdt. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code Ann. § 48-39-10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, **[1008]** § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48-39-130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landwardmost "points of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. S. C. Code Ann. § 48-39-280(A)(2) (Supp. 1988). [1] In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act **[1009]** construction of occupyable improvements [2] was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. § 48-39-290(A). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprived Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and rendered them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $ 1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the **[1010]** Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." 304 S.C. 376, 379, 404 S.E.2d 895, 896 (1991). Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina Legislature that new construction in the coastal zone -- such as petitioner intended -- threatened this public resource. *Id.*, at 383, 404 S.E.2d at 898. The court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," *id.*, at 383, 404 S.E.2d at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property -- *i.e.*, uses of property akin to "public nuisances" -- without having to pay compensation. But they would not have characterized the Beachfront Management Act's "*primary* purpose [as] the prevention of a nuisance." 304 S.C. at 395, 404 S.E.2d at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S.E.2d at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 U.S. 966 (1991).

II

LEdHN[2A] [2A]As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to **[1011]** authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986). See also *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council. See Brief for Respondent 9, n.3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Cf., *e.g.*, *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 631-632, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's *past* deprivation, *i.e.*, for his having been denied construction rights during the period before the 1990 amendment. See generally *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) (holding that **[1012]** temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and

judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period.

LEdHN[2B] [2B]***LEdHN[3A]*** [3A]In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury in fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. [3] That there is a discretionary **[1013]** "special permit" procedure by which he may regain -- for the future, at least -- beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. denied, *post*, 505 U.S. 1219.[4] We leave for decision on remand, of course, the questions left unaddressed by the South **[1014]** Carolina Supreme Court as a consequence of its categorical disposition. [5] ***LEdHN[2C]*** [2C]

LEdHN[3B] [3B]

III

A

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551, 20 L. Ed. 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession," *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336 (1879). See also *Gibson v. United States*, 166 U.S. 269, 275-276, 41 L. Ed. 996, 17 S. Ct. 578 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

[1015] Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)). See Epstein, Takings: Descent and Resurrection, *HN1* 1987 S. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435-440, even though the facilities occupied at most only 1 1/2 cubic feet of the landlords' property, see *id.*, at 438, n.16. See also *United States v. Causby*, 328 U.S. 256, 265, 90 L. Ed. 1206, 66 S. Ct. 1062, and n.10 (1946) (physical invasions of airspace); cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) (imposition of navigational servitude upon private marina).

LEdHN[4A] [4A]The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S. at 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987);*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472,

107 S. Ct. 1232 (1987);*Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296, 69 L. Ed. 2d 1, 101 S. Ct. 2352 **[1016]** (1981).[6]***HN2*** As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*," *Agins, supra*, at 260 (citations omitted) (emphasis added). [7]

LEdHN[4B] [4B]

[1017] We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 652 (dissenting opinion). "For what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, **[1018]** 438 U.S. at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation -- that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413 -- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, *e.g., Annicelli v. South Kingstown*, 463 A.2d 133, 140-141 (R. I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 552-553, 193 A.2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co., supra*, at 652 (dissenting opinion). The many statutes on the books, both state and federal, that **[1019]** provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, *e.g.*, 16 U.S.C. § 410ff-1(a) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)"); § 460aa-2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921-3923 (authorizing acquisition of wetlands); N. C. Gen. Stat. § 113A-38 (1990) (authorizing acquisition of, *inter alia*, "'scenic easements'" within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 to 11-15-108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

LEdHN[4C] [4C] ***LEdHN[5A]*** [5A]We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. [8]

LEdHN[5B] [5B]

[1020] B

LEdHN[6A] [6A]The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban. [9] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the

Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his **[1021]** land might occasion. 304 S.C. at 384, 404 S.E.2d at 899. By neglecting to dispute the findings enumerated in the Act [10] or otherwise to challenge the legislature's purposes, **[1022]** petitioner "conceded that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382-383, 404 S.E.2d at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962) (law effectively preventing continued operation of quarry in residential area).

LEdHN[6B] [6B]

LEdHN[1B] [1B]It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government **[1023]** may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate -- a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, *e.g., Penn Central Transportation Co.*, 438 U.S. at 125 (where ***HN4*** State "reasonably concludes that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also *Nollan v. California Coastal Comm'n*, 483 U.S. at 834-835 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] they have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

> "The uses in issue in *Hadacheck, Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no 'blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induced society to shift the cost to a particular individual.' Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy -- not unlike historic preservation -- expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U.S. at 133-134, n.30.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that **[1024]** ***HN5*** "land-use regulation does not effect a taking if it 'substantially advances legitimate state interests' . . . ." *Nollan, supra*, at 834 (quoting *Agins v. Tiburon*, 447 U.S. at 260); see also *Penn Central Transportation Co., supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388, 71 L. Ed. 303, 47 S. Ct. 114 (1926).

LEdHN[1C] [1C]The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological,

economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve. [11] Compare, *e.g.*, *Claridge v. New Hampshire* **[1025]** *Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, *e.g.*, *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserving marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts § 822, Comment *g*, p. 112 (1979) ("Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). ***HN6*** A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and the Police Power, 74 Yale L. J. 36, 49 (1964) ("The problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield. [12]

LEdHN[1D] [1D]

[1026] When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" -- which require compensation -- from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S. at 513-514 (REHNQUIST, C. J., dissenting). [13]

[1027] ***LEdHN[1E]*** [1E]***LEdHN[7A]*** [7A]***HN7*** Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. [14] This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render **[1028]** his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture. [15]

LEdHN[7B] [7B]

LEdHN[1F] [1F]***LEdHN[8]*** [8]***HN8*** Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426 -- though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's **[1029]** title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L. Ed. 126, 21 S. Ct. 48 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S. at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded ***HN9*** confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. [16]

LEdHN[1G] [1G] ***LEdHN[9]*** [9] ***LEdHN[10A]*** [10A]On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible **[1030]** under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239-1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); see, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984); *Hughes v. Washington*, 389 U.S. 290, 295, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. ***HN10*** When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it. [17]

LEdHN[10B] [10B]

LEdHN[11] [11]The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, **[1031]** posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see *id.*, § 827, Comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

LEdHN[1H] [1H]*LEdHN[12]* [12]It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86, 56 L. Ed. 102, 32 S. Ct. 31 (1911).The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can **[1032]** the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing. [18] *LEdHN[11]* [11]

* * *

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Concur by: KENNEDY

Concur

JUSTICE KENNEDY, concurring in the judgment.

The case comes to the Court in an unusual posture, as all my colleagues observe. *Ante*, at 1010-1011; *post*, 505 U.S. at 1041 (BLACKMUN, J., dissenting); *post*, 505 U.S. at 1061-1062 (STEVENS, J., dissenting); *post*, 505 U.S. at 1076-1077 (statement of SOUTER, J.). After the suit was initiated but before it reached us, South Carolina amended its Beachfront Management Act to authorize the issuance of special permits at variance with the Act's general limitations. See S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991). Petitioner has not applied for a special permit but may still do so. The availability of this alternative, if it can be invoked, may dispose of petitioner's claim of a permanent taking. As I read the Court's opinion, it does not decide the permanent taking claim, but neither does it foreclose the Supreme Court of South Carolina from considering the claim or requiring petitioner to pursue an administrative alternative not previously available.

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo **[1033]** what has occurred in the past. The Beachfront Management Act was enacted in 1988. S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990). It may have deprived petitioner of the use of his land in an interim period. § 48-39-290(A). If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).

The issues presented in the case are ready for our decision. The Supreme Court of South Carolina decided the case on constitutional grounds, and its rulings are now before us. There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it. The State cannot complain of the manner in which the issues arose. Any uncertainty in this regard is attributable to the State, as a consequence of its amendment to the Beachfront Management Act. If the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law.

Although we establish a framework for remand, moreover, we do not decide the ultimate question whether a temporary taking has occurred in this case. The facts necessary to the determination have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period

because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements will be part of that analysis.

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App. to Pet. for Cert. 37. The finding appears to presume that the property has no significant market **[1034]** value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction. *Post*, 505 U.S. at 1043-1045 (BLACKMUN, J., dissenting); *post*, 505 U.S. at 1065, n.3 (STEVENS, J., dissenting); *post*, 505 U.S. at 1076 (statement of SOUTER, J.). While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978); see also *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 79 L. Ed. 1298, 55 S. Ct. 555 (1935). The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. *Mugler v. Kansas*, 123 U.S. 623, 669, 31 L. Ed. 205, 8 S. Ct. 273 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. *E.g., Katz v.* **[1035]** *United States*, 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt v. Hempstead*, 369 U.S. 590, 593, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means, as well as the ends, of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual **[1036]** lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

With these observations, I concur in the judgment of the Court.

Dissent by: BLACKMUN; STEVENS

Dissent

JUSTICE BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as JUSTICE KENNEDY demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Takings Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests -- not because I can intercept **[1037]** the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

I

A

In 1972 Congress passed the Coastal Zone Management Act. 16 U.S.C. § 1451 *et seq.* The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline erosion and coastal hazards. In the 1980 amendments to the Act, Congress directed States to enhance their coastal programs by "preventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas." [1] 16 U.S.C. § 1456b(a)(2) (1988 ed., Supp. II).

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the South Carolina Coastal Council (Council), and the construction of any habitable structure was prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and **[1038]** propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management I, 6-10 (Mar. 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available. [2] S. C. Code Ann. § 48-39-280 (Supp. 1991).

B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development. [3] The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr. 84. Between 1957 and 1963, petitioner's property was under water. *Id.*, at 79, 81-82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. *Ibid.* In 1973 the first line of stable vegetation was about halfway through the property. *Id.*, at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for **[1039]** sandbagging to protect property in the Wild Dune development. *Id.*, at 99. Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. *Id.*, at 102.

C

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable -- that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protecting life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." S. C. Code Ann. § 48-39-250(1)(a) (Supp. 1990). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." § 48-39-250(4); see also § 48-39-250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce **[1040]** it." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (internal quotation marks omitted); see also *id.*, at 488-489, and n.18. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See, *e.g.*, *Goldblatt v. Hempstead*, 369 U S. 590, 592-593, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608, 71 L. Ed. 1228, 47 S. Ct. 675 (1927); *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr. 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 S.C. 376, 383, 404 S.E.2d 895, 898 (1991), and "to prevent serious injury to the community." *Id.*, at 387, 404 S.E.2d at 901. The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme." *Id.*, at 383, 404 S.E.2d at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion. Because that legislative determination cannot be disregarded in the absence of such evidence, see, *e.g.*, *Euclid*, 272 U.S. at 388; *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258, 75 L. Ed. 324, 51 S. Ct. 130 (1931) (Brandeis, J.), and because its determination

[1041] of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. see *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 191, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). See also *MacDonald, Sommer & Frates*, 477 U.S. at 348 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See *ante*, 505 U.S. at 1011-1012. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. **[1042]** The Court, however, will not be denied: It determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable. [4]

From the very beginning of this litigation, respondent has argued that the courts

> "lack jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line." Tr. 10 (answer, as amended).

Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or erosion rate applied to his property in formal administrative, followed by judicial, proceedings. S. C. Code Ann. § 48-39-280(E) (Supp. 1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr. 20, 25, 36. If he was correct, the Council's **[1043]** final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property.

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "We have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). See also *Williamson County*, 473 U.S. at 188 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations). [5]

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new takings jurisprudence based on the trial court's finding that the property **[1044]** had lost all economic value. [6] This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, *e.g.*, *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972), cert. denied, 409 U.S. 1108 (1973); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr. 54-55. The appraiser's value was based on the fact that the "highest and best use of these lots . . . [is] luxury single family detached dwellings." *Id.*, at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see *Goldblatt*, 369 U.S. at 592, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions **[1045]** was "total." Record 128 (findings of fact). I agree with the Court, *ante*, 505 U.S. at 1020, n.9, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstances," *ante*, 505 U.S. at 1017.

Clearly, the Court was eager to decide this case. [7] But eagerness, in the absence of proper jurisdiction, must -- and in this case should have been -- met with restraint.

III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "The existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 82 L. Ed. 1234, 58 S. Ct. 778 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." *Berman v. Parker*, **[1046]** 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954). See also *Sweet v. Rechel*, 159 U.S. 380, 392, 40 L. Ed. 188, 16 S. Ct. 43 (1895); *Euclid*, 272 U.S. at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young*, 282 U.S. at 258. In the absence of such proof, "the presumption of constitutionality must prevail." *Id.*, at 257. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See *Keystone Bituminous Coal*, 480 U.S. at 485. See also *Goldblatt*, 369 U.S. at 594 (citing "the usual presumption of constitutionality" that applies to statutes attacked as takings).

Rather than invoking these traditional rules, the Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasizes" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. *Ante*, 505 U.S. at 1031. In this case, apparently, the State now has the burden of showing the

regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could.

IV

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they **[1047]** prohibit is a background common-law nuisance or property principle. See *ante*, 505 U.S. at 1028-1031.

A

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced," *ante*, 505 U.S. at 1015, if all economic value has been lost. If one fact about the Court's takings jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 2 L. Ed. 2d 1228, 78 S. Ct. 1097 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." *Mugler v. Kansas*, **[1048]** 123 U.S. at 668-669. On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the "establishments will become of no value as property." *Id.*, at 664; see also *id.*, at 668.

Mugler was only the beginning in a long line of cases. [8] In *Powell v. Pennsylvania*, 127 U.S. 678, 32 L. Ed. 253, 8 S. Ct. 992 (1888), the Court upheld legislation prohibiting the manufacture of oleomargarine, despite the owner's allegation that "if prevented from continuing it, the value of his property employed therein would be entirely lost and he be deprived of the means of livelihood." *Id.*, at 682. In *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915), the Court upheld an ordinance prohibiting a brickyard, although the owner had made excavations on the land that prevented it from being utilized for any purpose but a brickyard. *Id.*, at 405. In *Miller v. Schoene*, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928), the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. The "preferment of [the public interest] over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.*, at 280. Again, in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 67 L. Ed. 773, 43 S. Ct. 437 (1923), the Court stated that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." *Id.*, at 508.

More recently, in *Goldblatt*, the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety. **[1049]** 369 U.S. at 596. "Although a comparison of values before and after is relevant," the Court stated, "it is by no means conclusive." [9] *Id.*, at 594. In 1978, the Court declared that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed . . . recognized real property interests." *Penn Central Transp. Co.*, 438 U.S. at 125. In *First*

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), the owner alleged that a floodplain ordinance had deprived it of "all use" of the property. *Id.*, at 312. The Court remanded the case for consideration whether, even if the ordinance denied the owner all use, it could be justified as a safety measure. [10] *Id.*, at 313. And in *Keystone Bituminous Coal*, the Court summarized over 100 years of precedent: "The Court has repeatedly upheld regulations that destroy or adversely affect real property interests." [11] 480 U.S. at 489, n.18.

[1050] The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," *ante*, 505 U.S. at 1022, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use. [12] Instead, the cases depended on whether the **[1051]** government interest was sufficient to prohibit the activity, given the significant private cost. [13]

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "Since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal*, 480 U.S. at 491, n.20. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss. [14] See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 418, 67 L. Ed. 322, 43 S. Ct. 158 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

[1052] B

Ultimately even the Court cannot embrace the full implications of its *per se* rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law." [15] *Ante*, 505 U.S. at 1031.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance. [16] The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine **[1053]** what measures would be appropriate for the protection of public health and safety. See 123 U.S. at 661. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U.S. at 280. See also *Goldblatt*, 369 U.S. at 593; *Hadacheck*, 239 U.S. at 411. Instead the Court has relied in the past, as the South Carolina court has done here, on legislative judgments of what constitutes a harm. [17]

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Ante*, 505 U.S. at 1024. Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," *ante*, 505 U.S. at 1025, the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation, *ante*, 505 U.S. at 1026. The Court, however, fails to explain how its proposed common-law alternative escapes the same trap.

[1054] The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction," *ante*, 505 U.S. at 1017, n.7, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We

have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . ." [18] Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1614 (1988).

The Court's decision in *Keystone Bituminous Coal* illustrates this principle perfectly. In *Keystone*, the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 U.S. at 501. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. *Ibid.* The dissent, however, characterized the support estate as a distinct property interest that was wholly destroyed. *Id.*, at 519. The Court could agree on no "value-free basis" to resolve this dispute.

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a valuefree takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance **[1055]** law is simply a determination whether a particular use causes harm. See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966) ("*Nuisance* is a French word which means nothing more than harm"). There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." [19] Once one abandons the level of generality of *sic utere tuo ut alienum non laedas, ante*, 505 U.S. at 1031, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

C

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the "'long recognized'" "understandings of our citizens." *Ante*, 505 U.S. at 1027. These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." *Ante*, 505 U.S. at 1028. It is not clear from the Court's **[1056]** opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.

> "The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit -- regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation 'extends to the public benefit . . . for this is for the public, and every one hath benefit by it.'" F. Bosselman, D. Callies, & J. Banta, The Taking Issue 80-81 (1973), quoting *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12-13 (1606) (hereinafter Bosselman).

See also Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 697, n.9 (1985). [20]

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners. [21] See M. Horwitz, The Transformation of American Law, 1780-1860, pp. 63-64 (1977) (hereinafter Horwitz); Treanor, 94 Yale L. J., at 695. As one court declared in 1802, citizens "were bound **[1057]** to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." *M'Clenachan v. Curwin*, 3 Yeates 362, 373 (Pa. 1802). There was an obvious movement toward establishing the just compensation principle during the 19th century, but "there continued to be a strong current in American legal thought that regarded compensation simply as a 'bounty given . . . by the State' out of 'kindness' and not out of justice." Horwitz 65, quoting *Commonwealth v. Fisher*, 1 Pen. & W. 462, 465 (Pa. 1830). See also *State v. Dawson*, 21 S.C. L. 100, 3 Hill 100, 103 (S. C. 1836). [22]

Although, prior to the adoption of the Bill of Rights, America was replete with land-use regulations describing which activities were considered noxious and forbidden, see Bender, The Takings Clause: Principles or Politics?, 34 Buffalo L. Rev. 735, 751 (1985); L. Friedman, A History of American Law 66-68 (1973), the Fifth Amendment's Takings Clause originally did not extend to regulations of property, whatever the effect. [23] See *ante*, 505 U.S. at 1014. Most state courts agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century . . . jurists held that **[1058]** the constitution protected possession only, and not value." Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. Cal. L. Rev. 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See *ibid.*; *Callender v. Marsh*, 1 Pick. 418, 430 (Mass. 1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public. [24] In the *Coates* cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." *Coates v. City of New York*, 7 Cow. 585, 592 (N. Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N. Y. 1826); *Commonwealth v. Alger*, 7 Cush. 53, 59, 104 (Mass. 1851); *St. Louis Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 146, 137 S.W. 929, 942 (1911), appeal dism'd, 231 U.S. 761 (1913). More recent cases reach the same result. See *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dism'd, 371 U.S. 36 (1962); *Nassr v.* **[1059]** *Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." *Lindsay v. Commissioners*, 2 S.C. L. 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale L. J., at 695 (footnotes omitted). This rule was followed by some States into the 1800's. See Horwitz 63-65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See *id.*, at 32. Thus, for example, the owner could build nothing on his land that would alter the natural flow of water. See *id.*, at 44; see also, *e. g., Merritt v. Parker*, 1 Coxe 460, 463 (N. J. 1795). Some more recent state courts still follow this reasoning. See, *e. g., Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Takings Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common-law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public." **[1060]** *Tewksbury*, 11 Metc., at 57. [25] Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." *Alger*, 7 Cush., at 104; see also *State v. Paul*, 5 R.I. 185, 193 (1858); *Commonwealth v. Parks*, 155 Mass. 531, 532, 30 N.E. 174 (1892) (Holmes, J.) ("The legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new takings doctrine. Instead, the Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Takings Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined

which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact. [26]

[1061] V

The Court makes sweeping and, in my view, misguided and unsupported changes in our takings doctrine. While it limits these changes to the most narrow subset of government regulation -- those that eliminate all economic value from land -- these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

JUSTICE STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

I

As the Court notes, *ante*, 505 U.S. at 1010-1011, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is **[1062]** the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute. [1] Thus, on the present record it is entirely possible that petitioner has suffered no injury in fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 341, 80 L. Ed. 688, 56 S. Ct. 466 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.*, at 346. The second of those rules applies directly to this case.

> "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 28 L. Ed. 899, 5 S. Ct. 352; [citing five additional cases]. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States* , 196 U.S. 283, 295, 49 L. Ed. 482, 25 S. Ct. 243." 297 U.S. at 346-347.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at **[1063]** 1013. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, 505 U.S. at 1026, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation, *ante*, 505 U.S. at 1027-1029. The test the Court announces is that the regulation must "do no more than duplicate the result that could have been achieved" under a State's nuisance law. *Ante*, 505 U.S. at 1029. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

The Categorical Rule

As the Court recognizes, *ante*, 505 U.S. at 1015, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), provides no support for its -- or, indeed, any -- categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree -- and therefore cannot be disposed of by general propositions." *Id.*, at 416. What he had "already . . . said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminution **[1064]** [of value.] So the question depends upon the particular facts." *Id.*, at 413.

Nor does the Court's new categorical rule find support in decisions following *Mahon*. Although in dicta we have sometimes recited that a law "effects a taking if [it] . . . denies an owner economically viable use of his land," *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980), our *rulings* have rejected such an absolute position. We have frequently -- and recently -- held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, *e. g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590, 596, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); *United States v. Caltex*, 344 U.S. 149, 155, 97 L. Ed. 157, 73 S. Ct. 200 (1952); *Miller v. Schoene*, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 60 L. Ed. 348, 36 S. Ct. 143 (1915); *Mugler v. Kansas*, 123 U.S. 623, 657, 31 L. Ed. 205, 8 S. Ct. 273 (1887); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986). In short, as we stated in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 490, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), "'Although a comparison of values before and after' a regulatory action 'is relevant, . . . it is by no means conclusive.'"

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S. C. Acts 634, § 3; see also *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 167 (CA4 1991). [2] Thus, if the homes adjacent to Lucas' **[1065]** lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that -- notwithstanding the Court's findings to the contrary in each case -- the brewery in *Mugler*, the brickyard in *Hadacheck*, and the gravel pit in *Goldblatt* all could

be put to "other uses" and that, therefore, those cases did not involve total regulatory takings. [3] *Ante*, 505 U.S. at 1026, n.13.

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that **[1066]** allows only single-family homes would render the investor's property interest "valueless." [4] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." *Ante*, 505 U.S. at 1017. This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 71 L. Ed. 303, 47 S. Ct. 114 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." *Ante*, 505 U.S. at 1018. This argument proves too little. Certainly it is true that defining a small class of regulations that are *per se* takings will not **[1067]** greatly hinder important governmental functions -- but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some form of public service." *Ibid.* As discussed more fully below, see Part III, *infra*, I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a *per se* rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: A regulation may single out a property owner without depriving him of all of his property, see, *e. g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *J. E. D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981); and it may deprive him of all of his property without singling him out, see, *e. g., Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915). What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U. S. Reports. No sooner does the Court state that "total regulatory takings must be compensated," *ante*, 505 U.S. at 1026, than it quickly establishes an exception to that rule.

[1068] The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." *Ante*, 505 U.S. at 1029-1030. The Court thus rejects the basic holding in *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887). There we held that a statewide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even

though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. We squarely rejected the rule the Court adopts today:

> "It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. The supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a State's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U.S. at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional **[1069]** power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

> "If accepted, that claim would represent a return to the era of *Lochner v. New York* , 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution -- both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, *e. g., Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979); the importance of wetlands, see, *e. g.*, 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal **[1070]** lands, see, *e. g.*, 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated -- but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow government "'the largest legislative discretion'" to deal with "'the special exigencies of the moment,'" *Mugler*, 123 U.S. at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past. [5]

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case -- in which the claims of an *individual* property owner exceed $ 1 million -- well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law. [6]

[1071] Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquiry." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. at 594). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960), and "necessarily requires a weighing of private and public interests," *Agins*, 447 U.S. at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard* , 447 U.S. at 83. The Court's analysis today focuses on the last two of these three factors: The categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first and, in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Accordingly, one of the central concerns of our takings jurisprudence is "preventing the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United* **[1072]** *States*, 148 U.S. 312, 325 (1893). We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property. [7]

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "be singled out to bear the burden" of a broader problem not of his own making. *Nollan*, 483 U.S. at 835, n.4; see also *Pennell v. San Jose*, 485 U.S. 1, 23, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act (at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler **[1073]** Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners -- including the coal companies -- equally. See *Keystone*, 480 U.S. at 486. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U.S. at 132, and n.28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out." [8] Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982), is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. See, *e. g., A. A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (CA11 1988); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357 So. 2d 1299, 1304 (La. App. 1978); see also *Burrows v. Keene*, 121 N.H. 590, 596, 432 A.2d 15, 21 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324-325 (Mo. App. 1976); *Huttig v. Richmond Heights*, **[1074]** 372 S.W.2d 833, 842-843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only,

out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S. C. Code Ann. § 48-39-10 (Supp. 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the federal Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280, codified as amended at 16 U. S. C. § 1451 *et seq.* Pursuant to the federal Act, every coastal State has implemented coastline regulations. [9] Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S. C. Acts 634, § 3, [10] and what is equally significant, from repairing erosion control devices, such as seawalls, see S. C. Code Ann. § 48-39-290 (B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renourish the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S. C. Acts 634, § 3, p. 5140. [11] In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped **[1075]** land alike. [12] This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater; I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protecting, preserving, restoring and enhancing the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protect life and property." S. C. Code Ann. § 48-39-260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $ 6 billion in property damage in South Carolina alone. [13]

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South **[1076]** Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, see, *e. g., Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 493-502, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979); *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104, 130-131, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, 505 U.S. at 1016-1017, n.6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. **[1077]** This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); *id.*, § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, § 89 (private nuisances usually remedied by damages, injunction, or abatement); see also, *e. g., Mugler v. Kansas*, 123 U.S. 623, 668-669, 31 L. Ed. 205, 8 S. Ct. 273 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck v. Sebastian*, **[1078]** 239 U.S. 394, 412, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, *e. g., Welsh v. Wisconsin*, 466 U.S. 740, 755, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984) (Burger, C. J.); *United States v. Shannon*, 342 U.S. 288, 294, 96 L. Ed. 321, 72 S. Ct. 281 (1952) (Frankfurter, J.).

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Annotation References:

Supreme Court's views as to what constitutes "private property" within meaning of prohibition, under Federal Constitution's Fifth Amendment, against taking of private property for public use without just compensation. 91 L Ed 2d 582.

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Local use zoning of wetlands or flood plain as taking without compensation. 19 ALR4th 756.

Footnote *

Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Clegg, Acting Deputy Assistant Attorney General Cohen, Edwin S. Kneedler, Peter R. Steenland, James E. Brookshire, John A. Bryson, and Martin W. Matzen; for United States Senator Steve Symms et al. by Peter D. Dickson, Howard E. Shapiro, and D. Eric Hultman; for the American Farm Bureau Federation et al. by James D. Holzhauer, Clifford M. Sloan, Timothy S. Bishop, John J. Rademacher, and Richard L. Krause; for the American Mining Congress et al. by George W. Miller, Walter A. Smith, Jr., Stuart A. Sanderson, William E. Hynan, and Robert A. Kirshner; for the Chamber of Commerce of the United States of America by Stephen A. Bokat, Robin S. Conrad, Herbert L. Fenster, and Tami Lyn Azorsky; for Defenders of Property Rights et al. by Nancy G. Marzulla; for the Fire Island Association, Inc., by Bernard S. Meyer; for the Institute for Justice by Richard A. Epstein, William H. Mellor III, Clint Bolick, and Jonathan W. Emord; for the Long Beach Island Oceanfront Homeowners Association et al. by Theodore J. Carlson; for the Mountain States Legal Foundation et al. by William Perry Pendley; for the National Association of Home Builders et al. by Michael M. Berger and William H. Ethier; for the Nemours Foundation, Inc., by John J. Mullenholz; for the Northern Virginia Chapter of the National Association of Industrial and Office Parks et al. by John Holland Foote and John F. Cahill; for the Pacific Legal Foundation by Ronald A. Zumbrun, Edward J. Connor, Jr., and R. S. Radford; and for the South Carolina Policy Council Education Foundation et al. by G. Stephen Parker.

Briefs of amici curiae urging affirmance were filed for the State of California by Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General, Richard M. Frank and Craig C. Thompson, Supervising Deputy Attorneys General, and Maria Dante Brown and Virna L. Santos, Deputy Attorneys General; for the State of Florida et al. by Robert A. Butterworth, Attorney General of Florida, and Lewis F. Hubener, Assistant Attorney General, James H. Evans, Attorney General of Alabama, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Michael J. Bowers, Attorney General of Georgia, Elizabeth Barrett-Anderson, Attorney General of Guam, Warren Price, Attorney General of Hawaii, Bonnie J. Campbell, Attorney General of Iowa, Michael E. Carpenter, Attorney General of Maine, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, John P. Arnold, Attorney General of New Hampshire, Tom Udall, Attorney General of New Mexico, Robert Abrams, Attorney General of New York, and Jerry

Boone, Solicitor General, Lacy H. Thornburg, Attorney General of North Carolina, Charles S. Crookham, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Jorges Perez-Diaz, Attorney General of Puerto Rico, James E. O'Neil, Attorney General of Rhode Island, Paul Van Dam, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, James E. Doyle, Attorney General of Wisconsin, Dan Morales, Attorney General of Texas, and Brian A. Goldman; for Broward County et al. by John J. Copelan, Jr., Herbert W. A. Thiele, and H. Hamilton Rice, Jr.; for California Cities and Counties by Robin D. Falsant, Gary T. Ragghianti, Manuela Albuquerque, F. Thomas Caporael, William Camil, Scott H. Howard, Roger Picquet, Joseph Barron, David J. Erwin, Charles J. Williams, John Calhoun, Robert K. Booth, Jr., Anthony S. Alperin, Leland H. Jordan, John L. Cook, Jayne Williams, Gary L. Gillig, Dave Larsen, Don G. Kircher, Jean Leonard Harris, Michael F. Dean, John W. Witt, C. Alan Sumption, Joan Gallo, George Rios, Daniel S. Hentschke, Joseph Lawrence, Peter Bulens, and Thomas Haas; for Nueces County, Texas, et al. by Peter A. A. Berle, Glenn P. Sugamell, Ann Powers, and Zygmunt J. B. Plater; for the American Planning Association et al. by H. Bissell Carey III and Gary A. Owen; for Members of the National Growth Management Leadership Project by John A. Humbach; for the Municipal Art Society of New York, Inc., by William E. Hegarty, Michael S. Gruen, Philip K. Howard, Norman Marcus, and Philip Weinberg; for the National Trust for Historic Preservation in the United States by Lloyd N. Cutler, Louis R. Cohen, David R. Johnson, Peter B. Hutt II, Jerold S. Kayden, David A. Doheny, and Elizabeth S. Merritt; for the Sierra Club et al. by Lawrence N. Minch, Laurens H. Silver, and Charles M. Chambers; and for the U.S. Conference of Mayors et al. by Richard Ruda, Michael G. Dzialo, and Barbara Etkind.

Briefs of amici curiae were filed for the National Association of Realtors by Ralph W. Holmen; and for the Washington Legal Foundation by Daniel J. Popeo and Paul D. Kamenar.

Footnote 1

This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which are directly influenced by the inlet and its associated shoals," S. C. Code Ann. § 48-39-270(7) (Supp. 1988)) that is "not stabilized by jetties, terminal groins, or other structures," § 48-39-280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established along "the crest of an ideal primary oceanfront sand dune." § 48-39-280(A)(1).

Footnote 2

The Act did allow the construction of certain nonhabitable improvements, *e.g.*, "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48-39-290(A)(1) and (2).

Footnote 3

JUSTICE BLACKMUN insists that this aspect of Lucas's claim is "not justiciable," *post*, 505 U.S. at 1042, because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), to "submit a plan for development of [his] property" to the proper state authorities, *id.*, at 187. See *post*, 505 U.S. at 1043. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as JUSTICE BLACKMUN apparently believes. See *post*, 505 U.S. at 1042, and n.5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's takings claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury in fact in his complaint. See App. to Pet. for Cert. 154 (complaint); *id.*, at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such

time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312-313, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987). JUSTICE BLACKMUN finds it "baffling," *post*, 505 U.S. at 1043, n.5, that we grant standing here, whereas "just a few days ago, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, *post*, 505 U.S. at 1036, is "eager to decide" it, *post*, 505 U.S. at 1045, and is unwilling to "be denied," *post*, 505 U.S. at 1042. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury in fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.

Footnote 4

In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed:

"The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (1991).

Footnote 5

JUSTICE BLACKMUN states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. *Post*, 505 U.S. at 1045, n.7. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case *after* the Act had been amended, and *after* it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

Footnote 6

We will not attempt to respond to all of JUSTICE BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge" and not for the point that "*denial* of such use is sufficient to establish a takings claim regardless of any other consideration." *Post*, 505 U.S. at 1050, n.11. The cases say, repeatedly and unmistakably, that "'the *HN3* test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."*'" *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295-296 (quoting *Agins*, 447 U.S. at 260)) (emphasis added). JUSTICE BLACKMUN describes that rule (which we do not invent but merely apply today) as "altering the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." *Post*, 505 U.S. at 1045, 1046. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule with

exceptions presumes the invalidity of a law that violates it -- for example, the rule generally prohibiting content-based restrictions on speech. See, *e.g., Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). JUSTICE BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

Footnote 7

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme -- and, we think, unsupportable -- view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277, 397 N.Y.S.2d 914 (1977), aff'd, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 67 L. Ed. 322, 43 S. Ct. 158 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (REHNQUIST, C. J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Footnote 8

JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, 505 U.S. at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations. JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." *Post*, 505 U.S. at 1065, n.3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, *e.g., Loretto*

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (interest in excluding strangers from one's land).

Footnote 9

This finding was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45-50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985).

Footnote 10

The legislature's express findings include the following:

"The General Assembly finds that:

"(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) . . . Development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

. . . .

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S. C. Code Ann. § 48-39-250 (Supp. 1991).

Footnote 11

In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," 304 S.C. 376, 385, 404 S.E.2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S. C. Code Ann. § 48-39-250(1)(b) (Supp. 1991), in "providing habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "providing a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, 505 U.S. at 1040. He says "nothing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S. C. Code Ann. § 48-39-290(B) (Supp. 1988)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991).

Footnote 12

In JUSTICE BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, 505 U.S. at 1039, 1040-1041, 1047-1051. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Footnote 13

E. g., Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 58 L. Ed. 713, 34 S. Ct. 359 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U.S. 171, 59 L. Ed. 900, 35 S. Ct. 511 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962) (prohibition on excavation; other uses permitted).

Footnote 14

Drawing on our First Amendment jurisprudence, see, *e.g., Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-879, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), JUSTICE STEVENS would "look to the *generality* of a regulation of property" to determine whether compensation is owing. *Post*, 505 U.S. at 1072. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire State." *Post*, 505 U.S. at 1074.

There may be some validity to the principle JUSTICE STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith, supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law -- the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind -- cannot constitute a compensable taking. See 123 U.S. at 655-656. But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. JUSTICE STEVENS's approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

Footnote 15

After accusing us of "launching a missile to kill a mouse," *post*, 505 U.S. at 1036, JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897) -- which, as JUSTICE BLACKMUN acknowledges, occasionally included *outright physical appropriation* of land without compensation, see *post*, 505 U.S. at 1056 -- were out of accord with *any* plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, 505 U.S. at 1057-1058, and n.23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

Footnote 16

The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18-19, 25 L. Ed. 980 (1880); see *United States v. Pacific R. Co.*, 120 U.S. 227, 238-239, 30 L. Ed. 634, 7 S. Ct. 490 (1887).

Footnote 17

Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U.S. at 321. But "where ***HN11*** the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid.*

Footnote 18

JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention"/"benefit conferral" dichotomy, see *post*, 505 U.S. at 1054-1055. There is no doubt some leeway in a court's interpretation of what existing state law permits -- but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable*

application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

Footnote 1

The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club et al. as *Amici Curiae* 2-5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately $ 6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Calif. L. Rev. 205, 212-213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

Footnote 2

The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is 40 times the annual erosion rate. S. C. Code Ann. § 48-39-280 (Supp. 1991).

Footnote 3

The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $ 96,660, sold in 1984 for $ 187,500, then in 1985 for $ 260,000, and, finally, to Lucas in 1986 for $ 475,000. He estimated its worth in 1991 at $ 650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the lots and built on them. Tr. 44-46.

Footnote 4

The Court's reliance, *ante*, 505 U.S. at 1013, on *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. denied, *post*, 505 U.S., p. 1219, in support of its decision to consider Lucas' temporary takings claim ripe is misplaced. In *Esposito* the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an as-applied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question.

Footnote 5

Even more baffling, given its decision, just a few days ago, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App. to Pet. for Cert. 153-156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr. 28-29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'Some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require." 504 U.S. at 564. The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "'damages for the temporary taking of his property' from the date of the 1988 Act's passage to 'such time as this matter is finally resolved,'" *ante*, 505 U.S. at 1013, n.3, quoting the complaint, and failed to demonstrate any immediate concrete plans to build or sell.

Footnote 6

Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

Footnote 7

The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary takings claim. The Court chastises respondent for arguing that Lucas' temporary takings claim is premature because it failed "so much as [to] comment" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period." *Ante*, 505 U.S. at 1012. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary takings claim in the state courts.

Footnote 8

Prior to *Mugler*, the Court had held that owners whose real property is wholly destroyed to prevent the spread of a fire are not entitled to compensation. *Bowditch v. Boston*, 101 U.S. 16, 18-19, 25 L. Ed. 980 (1880). And the Court recognized in the *License Cases*, 46 U.S. (5 How.) 504, 589, 12 L. Ed. 256 (1847) (opinion of McLean, J.), that "the acknowledged police power of a State extends often to the destruction of property."

Footnote 9

That same year, an appeal came to the Court asking "whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation." Juris. Statement, O. T. 1962, No. 307, p. 5. The Court dismissed the appeal for lack of a substantial federal question. *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dism'd, 371 U.S. 36 (1962).

Footnote 10

On remand, the California court found no taking in part because the zoning regulation "involves this highest of public interests -- the prevention of death and injury." *First Lutheran Church v. Los Angeles*, 210 Cal. App. 3d 1353, 1370, 258 Cal. Rptr. 893, 904 (1989), cert. denied, 493 U.S. 1056, 107 L. Ed. 2d 950, 110 S. Ct. 866 (1990).

Footnote 11

The Court's suggestion that *Agins v. City of Tiburon*, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest." *Id.*, at 260-262. The other cases cited by the Court, *ante*, 505 U.S. at 1015, repeat the *Agins* sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-297, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). But the conclusion that a regulation is

not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a takings claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in *Agins, Hodel, Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), for its new categorical rule. *Ante*, 505 U.S. at 1015-1016. I prefer to rely on the directly contrary holdings in cases such as *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887), and *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915), not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S. at 260-262; *Keystone Bituminous Coal*, 480 U.S. at 489, n.18, 491-492.

Footnote 12

Miller v. Schoene, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." *Id.*, at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially salable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: The Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.*, at 280.

Footnote 13

The Court seeks to disavow the holdings and reasoning of *Mugler* and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest takings cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases -- that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation -- was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See *Keystone Bituminous Coal*, 480 U.S. at 491, n.20.

Footnote 14

"Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." *First Lutheran Church*, 210 Cal. App. 3d at 1366, 258 Cal. Rptr. at 901-902.

Footnote 15

Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, The Boundaries of Nuisance, 65 L. Q. Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 999-1000 (1966); J. Stephen, A General View of the Criminal Law of England 105-107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

Footnote 16

Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler v. Kansas*, 123 U.S. at 654; *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348, 36 S. Ct. 143 (1915); *Miller*, 276 U.S. at 272; *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U.S. at 410 (citation omitted).

Footnote 17

The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in *Mugler* and the South Carolina Supreme Court did in the instant case, would nullify *Pennsylvania Coal*. See *ante*, 505 U.S. at 1022-1023. Justice Holmes, the author of *Pennsylvania Coal*, joined *Miller v. Schoene*, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928), six years later. In *Miller*, the Court adopted the exact approach of the South Carolina court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that *Pennsylvania Coal* was inconsistent with *Mugler*, *Hadacheck*, *Miller*, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. *Keystone Bituminous Coal*, 480 U.S. at 490.

Footnote 18

See also Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192-1193 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36, 60 (1964).

Footnote 19

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts 616 (5th ed. 1984) (footnotes omitted). It is an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, Environmental Law § 2.4, p. 48 (1986) (footnotes omitted). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." *Milwaukee v. Illinois*, 451 U.S. 304, 317, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981).

Footnote 20

See generally Sax, 74 Yale L. J., at 56-59. "The evidence certainly seems to indicate that the mere fact that government activity destroyed existing economic advantages and power did not disturb [the English theorists who formulated the compensation notion] at all." *Id.*, at 56. Professor Sax contends that even Blackstone, "remembered champion of the language of private property," did not believe that the Compensation Clause was meant to preserve economic value. *Id.*, at 58-59.

Footnote 21

In 1796, the attorney general of South Carolina responded to property holders' demand for compensation when the State took their land to build a road by arguing that "there is not one

instance on record, and certainly none within the memory of the oldest man now living, of any demand being made for compensation for the soil or freehold of the lands." *Lindsay v. Commissioners*, 2 S. C. L. 38, 49 (1796).

Footnote 22

Only the Constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania Constitution, its sole requirement was that property not be taken without the consent of the legislature. See Grant, The "Higher Law" Background of the Law of Eminent Domain, in 2 Selected Essays on Constitutional Law 912, 915-916 (1938). By 1868, five of the original States still had no just compensation clauses in their Constitutions. *Ibid.*

Footnote 23

James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 711 (1985). Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale L. J., at 58, the "few authorities that are available" indicate that the Clause was "designed to prevent arbitrary government action," not to protect economic value. *Id.*, at 58-60.

Footnote 24

For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." *Coates v. City of New York*, 7 Cow. 585, 605 (N. Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538, 542 (N. Y. 1826); *Commonwealth v. Tewksbury*, 11 Metc. 55 (Mass. 1846); *State v. Paul*, 5 R.I. 185 (1858).

Footnote 25

More recent state-court decisions agree. See, *e. g., Lane v. Mt. Vernon*, 38 N.Y.2d 344, 348-349, 342 N.E.2d 571, 573, 379 N.Y.S.2d 798 (1976); *Commonwealth v. Baker*, 160 Pa. Super. 640, 641-642, 53 A.2d 829, 830 (1947).

Footnote 26

The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." *Ante*, 505 U.S. at 1028, and n.15. Nor apparently are we to find this compact in the early federal takings cases, which clearly permitted prohibition of harmful uses despite the alleged loss of all value, whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See *supra*, at 1047-1048, 1052-1053, and n.16. I cannot imagine where the Court finds its "historical compact," if not in history.

Footnote 1

In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

Footnote 2

This aspect of the Act was amended in 1990. See S. C. Code Ann. § 48-39-290(B) (Supp. 1990).

Footnote 3

Of course, the same could easily be said in this case: Lucas may put his land to "other uses" -- fishing or camping, for example -- or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "*economically* beneficial or productive use," *ante*, 505 U.S. at 1015 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

Footnote 4

This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. See *ante*, 505 U.S. at 1016-1017, n.7.

Footnote 5

Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, Economic Analysis and Just Compensation, 12 Int'l Rev. of Law & Econ. 125 (1992).

Footnote 6

As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, 505 U.S. at 1030, n.17. They may "invalidate the excessive regulation" or they may "allow the regulation to stand and order the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 335, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) (STEVENS, J., dissenting); see also *id.*, at 319-321. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

Footnote 7

This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction." See The Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879-880, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *United States v. Lee*, 455 U.S. 252, 263, n.3, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) (STEVENS, J., concurring in judgment). . . . In *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.' *Id.*, at 171. In *Braunfeld v. Brown*, 366 U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

Footnote 8

See Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1352-1354 (1991).

Footnote 9

See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Calif. L. Rev. 205, 216-217, nn. 46-47 (1991) (collecting statutes).

Footnote 10

This provision was amended in 1990. See S. C. Code Ann. § 48-39-290(B) (Supp. 1990).

Footnote 11

This provision was amended in 1990; authority for renourishment was shifted to local governments. See S. C. Code Ann. § 48-39-350(A) (Supp. 1990).

Footnote 12

In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922), and more closely resembles the general zoning scheme in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926), than the specific landmark designation in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

Footnote 13

Zalkin, 79 Calif. L. Rev., at 212-213.

Terms: **505 us 1003**
Search Type: **Citation**
Narrow by: **None**
Date and Time: **Thursday, December 19, 2013 – 02:01 PM**

Exhibit 25

EXHIBIT A:

LEGAL DESCRIPTION:

A STRIP OF LAND 27.55 FEET WIDE, IN THE CITY OF SAN CLEMENTE, COUNTY OF ORANGE, STATE OF CALIFORNIA, BEING A PORTION OF SECTION 32, TOWNSHIP 8 SOUTH, RANGE 7 WEST, SAN BERNARDINO BASE AND MERIDIAN, THE SOUTHWESTERLY LINE OF SAID STRIP BEING DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE SOUTHWESTERLY LINE OF THE A.T. & S.F. RAILWAY AND THE NORTHEASTERLY PROLONGATION OF THE SOUTHEASTERLY LINE OF LOT 16, BOTH AS SHOWN ON TRACT NO. 981 SAN CLEMENTE "THE SPANISH VILLAGE", PER MAP RECORDED IN BOOK 31, PAGE 26 OF MISCELLANEOUS MAPS, RECORDS OF ORANGE COUNTY, THENCE ALONG SAID SOUTHWESTERLY LINE OF SAID RAILWAY, NORTH 46°27' WEST 400.00 FEET TO THE MOST NORTHERLY CORNER OF SAID TRACT NO. 981, THENCE CONTINUING ALONG SAID SOUTHWESTERLY LINE OF RAILWAY, NORTH 46°27' WEST 3182.22 FEET TO THE SOUTHEASTERLY LINE OF THE LAND CONVEYED TO HERMAN H. GOLDSCHMIDT BY DEED RECORDED JULY 21, 1941 IN BOOK 1100, PAGE 480 OF OFFICIAL RECORDS OF SAID COUNTY, SAID LINE ALSO BEARS SOUTH 43°59' WEST FROM ENGINEERS STATION 232+73.32 FEET OF THE CALIFORNIA STATE HIGHWAY DESIGNATED AS DIVISION VII, ORANGE COUNTY ROUTE 2, SECTION A, APPROVED SEPTEMBER 22, 1914.

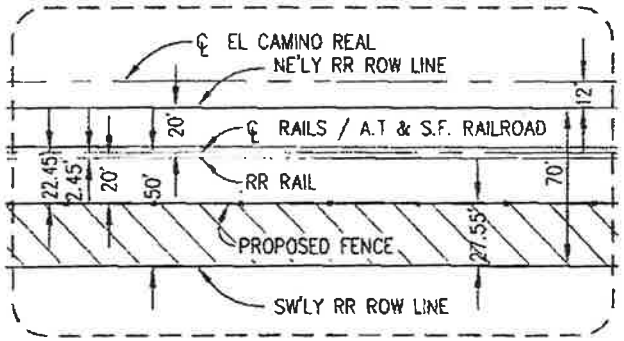
ALL AS SHOWN ON EXHIBIT B ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

PREPARED MY ME OR UNDER MY DIRECTION ON 14th DAY OF NOVEMBER 2013

JERRY L. USELTON, PLS 5347

EXHIBIT 'B'

DETAIL
SCALE: 1"=80'



LEGEND:

P.O.B. – POINT OF BEGINNING

ROW – RIGHT OF WAY

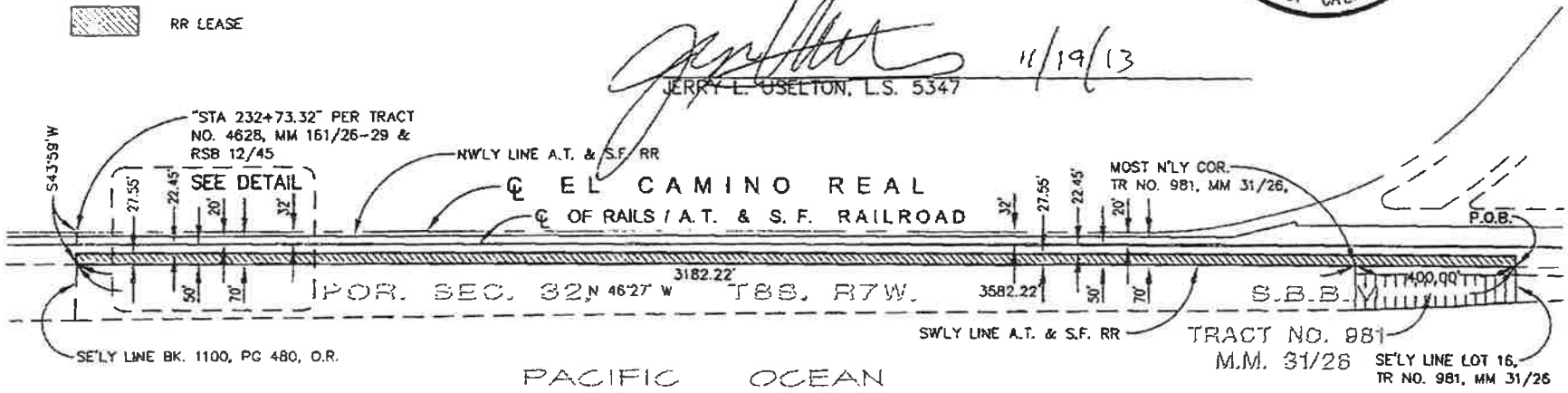
RR – RAILROAD

RR LEASE

LICENSED LAND SURVEYOR
JERRY L. USELTON
LS 5347
STATE OF CALIFORNIA

PREPARED UNDER MY SUPERVISION:

JERRY L. USELTON, L.S. 5347 11/19/13



FUSCOE ENGINEERING
16795 Von Karman, Suite 100, Irvine, California 92606
tel 949.474.1960 • fax 949.474.5315 • www.fuscoe.com

EXHIBIT 'B'
SKETCH TO ACCOMPANY LEGAL DESCRIPTION
RAILROAD LEASE
CAPISTRANO SHORES, INC.
SAN CLEMENTE, CA

DATE: NOV. 13, 2013
SCALE: 1" = 400'
JN: 1010.007.01
DRAWN BY: JBF
CHECKED BY: CT

SHEET 1 OF 1

M:\MAPPING\1010\07\LEGALS\1010-007LGX-RR.DWG (11-18-13)

M:\MAPPING\1010\07\LEGALS\1010-007LGX-RR.DWG (11-18-13)

Exhibit 26

I 1.26 Except as expressly provided hereinbelow no amendment to the City's General Plan, any adopted Specific Plan, or the City's Zoning Ordinance, that reclassifies all or any portion of any publicly owned or privately owned Open Space Area to Non-Open Space Uses and no new Specific Plan or zone change that reclassifies all or any portion of any publicly owned or privately owned Open Space Area to Non-Open Space Uses shall be effective until such General Plan amendment, Specific Plan amendment, Zoning Ordinance amendment, Specific Plan adoption, or zone change, as applicable, has been submitted to and approved by the City's voters at a general or special municipal election. As used herein, the term "Open Space Areas" shall include all areas located within the City and the City's sphere of influence that have any of the following designations or classifications as of the effective date of City Council Resolution No. 07-68, as those designations or classifications are defined in the City's General Plan, the City's Zoning Ordinance, and/or the applicable Specific Plan as of said date: (a) the OS 1, OS 2, OS 3, OSC, and OSR classifications set forth in Table 1-3 of the Land Use Element of the General Plan; (b) the OS 1, OS S1, OS 2, OS S2, OS 3, and OSC zoning categories listed in Section 17.08.010.E and Chapter 17.44 of the Municipal Code; (c) the S-1 and O-A zoning categories set forth in Sections 4.20 and 4.22 of the 1986 Zoning Ordinance governing the North Beach Study Area; and (d) the applicable provisions of the Specific Plans describing the areas to be set aside and reserved for open space in those plans. As used herein, the term "Non-Open Space Uses" shall mean any land uses that are not permitted or non-conditionally permitted uses within any of the Open Space Areas in accordance with Section 17.44.020 of the Municipal Code, the applicable sections governing designated open space areas within the Specific Plans and Sections of the 1986 Zoning Ordinance governing the North Beach Study Area as said Sections exist as of the effective date of City Council Resolution No. 07-68 and "Permitted Open Space Uses" shall mean any land uses that are permitted or conditionally permitted uses within any of the Open Space Areas in accordance with said Sections.

A General Plan amendment, Specific Plan amendment, Specific Plan adoption, or zone change reclassifying property from one open space classification to another open space classification shall not be subject to this Section V.Y and shall not require City voter approval as long as the reclassification does not authorize or permit Non-Open Space Uses in the applicable Open Space Area. In addition, an amendment or modification of a General Plan, Specific Plan, or Zoning Ordinance provision describing the permitted or prohibited uses within any of the Open Space Areas shall not be subject to this Section V.Y and shall not require City voter approval as long as the amendment or modification does not authorize or permit Non-Open Space Uses in any Open Space Area.

Notwithstanding the foregoing, a General Plan amendment, Specific Plan amendment, Zoning Ordinance amendment, Specific Plan adoption, or zone change that authorizes or permits Non-Open Space Uses in an Open Space Area shall not be subject to this Section V.Y and shall be permitted without City voter approval in the following circumstances only:

1. Upon the application of an affected landowner, if the City Council finds, based on substantial evidence, that the City's failure or refusal to reclassify the Open Space Area in question to a Non-Open Space Use would constitute an unconstitutional taking of the landowner's property; provided, however, that any such reclassification shall be made only to the extent necessary to avoid such an unconstitutional taking; or

2. Upon the application of an affected landowner to convert the Open Space Area to a residential use if the City Council determines that doing so is necessary to comply with federal or state law regarding the provision of housing. The City Council may do so only if it first makes each of the following findings based on substantial evidence in the record: (a) a specific provision of federal or state law requires the City to accommodate the proposed housing; (b) the amount of land to be reclassified is no greater than necessary to accommodate the required housing; (c) no alternative site within the City that is not an Open Space Area could be used to satisfy the applicable federal or state housing law; and (d) the proposed housing will be located adjacent to already developed lands and roads, unless locating the development in such areas would result in greater environmental impacts, would conflict with federal or state laws, or would not be feasible; or

3. To the extent not currently authorized in the applicable General Plan, Specific Plan, or Zoning Ordinance provisions applicable to a particular Open Space Area as of the effective date of Resolution No. 07-68, an amendment or modification to the class of authorized and permitted uses that authorizes or permits the construction, maintenance, and use of public roadways, public utilities, interpretive centers, amphitheaters, museums, public art, public facilities (including but not limited to structures for police, fire, and marine safety), active or passive recreational facilities, and facilities ancillary to the permitted Open Space Uses, including but not limited to parking facilities, lighting, signage, and public restrooms; or

4. To the extent the City Council determines, based on substantial evidence, that such reclassification is reasonably related to and required for either (a) a project for the stabilization of public or private buildings or property on adjacent land situated outside the Open Space Area that is being so reclassified; or (b) a project for the repair or restoration of damage to public or private buildings or property on adjacent land situated outside the Open Space that is being so reclassified; or

5. Upon the application of an affected landowner, the reclassification of an area of no more than one (1) acre in size, to the extent the City Council determines, based on substantial evidence, either that (a) the Open Space Area in question must be reclassified to authorize or permit a Non-Open Space Use in order to make it feasible for the landowner to develop or use the balance of his property or (b) reclassifying the Open Space Area in question to authorize or permit a Non-Open Space Use allows for a superior development alternative that benefits the public health, safety, or welfare; and provided that the one (1) acre maximum conversion of Permitted Open Space Uses to Non-Open Space Uses authorized under this clause 5 shall be calculated on a cumulative basis for each application; and provided that this exception shall not be applied if the primary reason for the application is to promote the economic feasibility of the project; or

6. As to a Specific Plan amendment or Zoning Amendment only, to the extent that such Specific Plan or zoning amendment is required in order to be consistent with the City General Plan in effect as of the effective date of City Council Resolution No. 07-68.

VI. GLOSSARY

A. Area Plan Provides for the cohesive and integrated development of land uses in a selected study area. The plan shall include:

a. The approximate mix and quantity of land uses, and approved Specific Plans to be accommodated based on an analysis of market conditions;

b. The timing and phasing of development to reflect infrastructure and capital improvements;

c. The establishment of linkages among principal land use districts; and

d. The siting and design of development to maintain and protect significant environmental and visual resources and mitigate and/or avoid hazards.

B. Automobile Service and Repair Including, but not limited to car was, car repair and service.

C. Building Modulation	The manner in which a facade (building front) is visually adjusted through setbacks, windows and doors to avoid monotonous forms.
D. Campus Park	Integrated development featuring extensive landscaping. Pedestrian connection, surface parking and attractively designed and sited buildings.
E. Common Building Wall	When facades fronting a street are sited along a common setback as to create a continuous building plane (parking is located to the rear of the building).
F. Facade Articulation	The manner in which a building form through design treatments (i.e., facades, window treatments, etc.) is visually connected and distinctly expressed.
G. Floor Area Ratio(FAR)	Is the total gross area of a building (floor space) excluding basements, balconies and stair bulkheads) on a lot divided by the total area of that lot.
H. Gross Acres	The total number of acres within a planning area (undeveloped land), including local street rights of way (either existing or to be dedicated), but excluding arterial street rights of way (either existing or to be dedicated).
I. Jobs Housing Ratio (JHR)	A method utilized by the Southern California Association of Governments (SCAG) to measure the balance of jobs to housing in the Southern California region as a way to lessen regional travel demands and to improve regional air quality. The ratio is an average for the entire SCAG planning region, where 1.12 jobs to housing is considered balanced.
J. Mixed Use	Where residential and non-residential uses are integrated vertically into the same structure.
K. Net Acres	The total number of acres created within a planning area once local street rights of way (either existing or to be dedicated) have been subtracted from the gross acres.
L. Overnight Accommodations	Hotels, motels, and bed and breakfast.